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LAW OF TORTS

A TREATISE ON THE LAW OF
CIVIL WRONGS AS IT PREVAILS IN ENGLAND AND IN INDIA

BY

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PREFACE TO THE FIRST EDITION.*

Mr. Ramaswamy Iyer's book on the Law of Torts is a valuable addition to the existing text-books on this subject, not only because it contains an accurate and well arranged summary of the principles of this branch of law, but also because it contains information as to the application of these principles in the Indian courts.

The English law of Torts is almost as peculiarly English as the English land law. Many of its principles and rules are the product of a continuous development by the courts from the days of the Year Books to modern times; and the technical shape which many of those rules and principles have taken is often due to the accidents of English legal history. Thus, the English theory of ownership and possession, which the courts of common law have evolved on wholly original lines from the procedural basis of the actions created to remedy wrongs to land and chattels, owes very little to the Roman law or to any other system of law. The English treatment of such subjects as defamation and conspiracy owes much to the manner in which bodies of law, developed in the first instance by the Court of Star Chamber, were taken over by the common law in the latter part of the seventeenth century, and adapted to a new technical environment. The variety of the remedies for tort—remedies summed up in the words abatement, self-help, damages, injunction—are reminiscent of many different periods in the history of the law; and the divergence between the last two of these remedies is due to that sharp separation between law and equity which the rigidity and technicality of the mediaeval common law imposed upon the English legal system, by making it necessary that law and equity should be administered in different jurisdictions. Therefore the English law of Torts, like the English land law, cannot be understood without a very thorough knowledge of its history; and for the attainment of a thorough knowledge of its history there is needed a knowledge of the technical rules of procedure in many different ages sufficient to make it possible to understand the old cases, in which the fundamental principles of the modern law are stated. Mr. Ramaswamy Iyer's book shows that he has mastered all these difficulties, and that he is able lucidly to expound this very English branch of the common law. At the same time his knowledge of the way in which this branch of the law has been applied in the Indian courts and

* By Sir William Searle Holdsworth, Kt., D.C.L., Vinerian Professor of Law, Oxford University. He passed away on 3-1-1944. The loss to the legal world due to this sad event can hardly be exaggerated.—S.R.

in the courts of the United States, gives to his exposition a comparative and a jurisprudential flavour, which is sometimes wanting in English books.

Lord Bryce in his *Studies in History and Jurisprudence* wrote an essay on *The Extension of Roman and English Law throughout the world*. In one section of that essay he compares the manner in which Roman law became the law of the different countries forming part of the Roman Empire, with the manner in which many branches of English law have become the law in force throughout India. Probably a more exact comparison would have been a comparison between this reception of English law in India, and the reception of Roman law in the states of modern Europe from the twelfth to the sixteenth centuries. It would have been more exact for two reasons. In the first place, the states of modern Europe received Roman law, not because they were subjugated by Rome, but because Roman law was more fit, than any code of law of which they had knowledge, to solve the problems of the more advanced stage of civilization to which they were attaining. It is for exactly the same reason that the rules of English law have been introduced not only into British India, but also into many of the more advanced Indian States. In the second place, the Roman law, when it was received, was adapted to its new environment. The technical rules and the technical reasoning of the Roman lawyers were used to lay the foundations of new developments in the law, which new social, economic, or political needs demanded; and thus to create new branches of law of which the classical Roman lawyers had never dreamt. One striking instance is the evolution of the negotiable instrument, by modifications in the technical rules of classical Roman law, but with the help of the technical reasoning of the classical Roman lawyers. So, in India, we may expect to see that the needs of India may produce modifications in English rules of law which, with the help of the technical reasoning of the common law, will produce new developments of common law principles.

Mr. Ramaswamy Iyer's book indicates one of the ways in which the rules of English law will be adapted to the new Indian environment. Just as the mediaeval civilians and canonists were, in the first place, learned Roman lawyers, so Mr. Ramaswamy Iyer is a learned English lawyer. But just as those mediaeval civilians and canonists were always conscious of the need to adapt the classical Roman law to the needs and ideas of a society which was very different from that of the Roman Empire, so the Indian lawyers who write text-books for the use of Indian lawyers, and the judges who decide cases in the Indian courts, will be conscious of the need to adapt the rules of English law to Indian needs. The Anglo-Indian codes and the case-law of the Indian courts show that these adaptations have been and will continue to be made. But codes are lifeless things compared with the living law evoked by the decision of cases, which turn upon the actual

happenings in the lives of human beings; and each individual case, which lays down living law based upon these actual happenings, can only cover a very small fraction of the field of law. As it was in mediæval Europe, so will it be in modern India—the text-books of learned lawyers, like Mr. Ramaswamy Iyer's book on the Law of Torts, will be the principal instruments of that adaptation, because their authors, having mastered the principles of the system of law which is to be adapted, will be the best able to make the necessary adaptations. Just as the mediæval civilians and canonists passed on into modern Europe the essential spirit of Roman law, and made that spirit one of the chief instruments in the development of the intellectual, political and economic progress of modern Europe; so lawyers, like Mr. Ramaswamy Iyer, will pass on into modern India the essential spirit of English law, and make it in the future, as it has been in the past, an instrument of developments, which will be stable and permanent in proportion as that essential spirit is mastered in theory and applied in practice.

ALL SOULS COLLEGE, }
 OXFORD,
July 7, 1932.

W. S. HOLDSWORTH.

PREFACE TO THE SECOND EDITION.*

I have been privileged to read the proofs of some parts of the second edition of Mr. Ramaswamy Iyer's book on the Law of Torts. When the last edition appeared it was received by the legal profession in India as a book of outstanding merit and practising lawyers have ever since turned to it for a statement of the law and relevant authorities on questions which may be engaging their attention for the moment. Sir William Holdsworth, the greatest living authority on the history of English Law, wrote a preface to the first edition in which he paid a rich and well deserved compliment to Mr. Ramaswamy Iyer and described him as a 'learned English lawyer'. No higher praise could be bestowed on an Indian lawyer who ventured to write on such a difficult branch of English Law.

Mr. Ramaswamy Iyer is right in saying that this branch of law has attained great proportions and attracts a very large amount of litigation in England and in the United States, though not to the same extent in India. Perhaps it is also true to say that many suits are fought every day in the

* By the Rt. Hon. Sir Tej Bahadur Sapru, K.C.S.I., P.C., Allahabad.

lower courts in India without it being clearly realised that they are really actions in tort and are governed by rules of the Common Law, which have by now been crystallised, except where statutory law has stepped in and that statutory law has no application to India. One of the necessary consequences of the development of constitutional liberties is bound to be a growing consciousness on the part of individuals of their rights and of a desire to protect those rights when invaded. Another feature of litigation in future may be foreshadowed and that is likely to relate to questions of conflict between the rights of the individual and the collective rights of society. The development of industrial life in India, the beginnings of which can be discerned in some important towns, is bound to lead to litigation of a new type. Workmen must claim compensation for injuries sustained by them in the course of their employment. The Legislature has already intervened and tried to embody some principles of the law relating to workmen in the Workmen's Compensation Act (VIII of 1923). The principles of law relating to civil conspiracy, boycott, general strikes, the liability of the manufacturer to a retail purchaser of his goods in the market only demonstrate what is not frequently recognised in India that the law of Torts is a growing organism with unsuspected possibilities of development. It is for this reason that the clear, concise and authoritative statement of the law as it has developed in its home of origin should be found to be useful by Indian lawyers. Such a statement is to be found in Mr. Ramaswamy Iyer's book, the second edition of which, I have no doubt, will be widely welcomed.

The law of Torts, as it is in England to-day, is in some respects very different from what it used to be when the first edition of Sir Frederick Pollock's celebrated book on the subject came out in 1887. It is not that all the old principles have been discarded or overruled, though some of them have, no doubt, been, but social conditions have been changing and Judges in England are always alive to the necessity of adjusting law to the varying conditions of society. One of the most remarkable developments of law in recent years has been in connection with cases which have been filed for damages for shortened expectation of life. Mr. Ramaswamy Iyer has dealt with cases dealing with this branch of the law at length at pages 69 to 72 (pp. 61-63, 3rd ed.) and again on the legislation of 1934 on the subject at pages 83 and 84 (pp. 71 and 72, 3rd ed.). This class of cases has not yet sprung up in India and even in England the question of assessment of damages in such cases has given rise to much controversy in recent months. Perhaps with the new conditions of transport which have come into existence we shall not have to wait for long before we shall be called upon to deal with problems of this character. Altogether Mr. Ramaswamy Iyer's book is one of which both he and we can feel proud. It can, in my opinion, be always

referred to with profit and I have myself used it on numerous occasions as a safe and reliable guide. It is a welcome sign of the times that in certain parts of India, if not everywhere, the class of scholarly lawyers who devote themselves to the study and exposition of law as a science, though limited in number, is growing apace. Madras and Bengal have led the way and among such lawyers Mr. Ramaswamy Iyer's place is assured.

ALLAHABAD, }
18th June, 1938. }

TEJ BAHADUR SAPRU.

AUTHOR'S PREFACE TO THE THIRD EDITION.

During the six years which have elapsed since the second edition of this book, there has been a very large addition to the case-law on this subject in England. The new cases are not merely large in number but also important and valuable for their exposition of principles and their contribution to the development of this branch of law. Therefore besides including them in the notes or discussing them in the text, substantial revision of the text has been made in several parts of the book. In some places (*e.g.*, Chap. XIX, para 40) this opportunity has been used for adding to or revising the text when such addition or revision appeared to be necessary to improve the book. The addition to the case-law in India is comparatively less substantial.

I have derived valuable assistance in the preparation of this edition from Mr. V. Ramaswami, B.A., M.L., Advocate, who will shortly join the judicial service as District Munsif. He read the proofs and also the typescript of additions and alterations made in the text before it was printed.

1—7—1944

• S. RAMASWAMY IYER.

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 Addison, Law of Torts (8th Ed.).
 American Law Institute, Restatement of the Law of Torts.
 Anglo-American Essays in Legal History (published by Association of American Law Schools).
 Annual Survey of English Law (London School of Economics and Political Science, Law Department) 1933, 1935, 1936.
 Arnold, Damages and Compensation (2nd Ed.).
 Bacon, F., Works (Spedding's Ed.).
 Bacon, M., Abridgment of the Law (7th Ed.).
 Bagchi, S.C., Law of Corporations, 1928, (Tagore Law Lectures, 1914).
 Ball, W.A., Law of Libel Affecting Newspapers.
 Baty, J., Vicarious Liability.
 Bell, G.J., Commentaries of the Law of Scotland.
 Bentham, J., Works (Bowring Ed.).
 Beven, Thomas, Negligence in Law (4th Ed.), 2 Vols.
 Birkenhead, Fourteen Judges.
 Blackstone, Sir W., Commentaries on the Laws of England (21st Ed.), 4 Vols.
 Bohlen, F.H., Studies in the Law of Torts.
 Bower, Spencer, A Code of Actionable Defamation.
 Brooke, Abridgment.
 Bryce, J., Studies in History and Jurisprudence.
 Buckland, W. W., Roman Private Law.
 Bullen and Leake, Pleadings and Practice (7th Ed.).
 Burdick, F. M., Law of Torts (3rd Ed.).
 Cambridge Law Journals.
 Carter, A.T., History of English Courts
 Carver, T G., Carriage of Goods by Sea (7th Ed.).
 Chafee, Zechariah, Cases on Equitable Relief Against Torts.
 Chitty, Pleading.
 „ Contracts.
 Clerk and Lindsell, Law of Torts (8th and 9th Eds.).
 Cohen, Arthur, in the Report of the Royal Commission on Trade disputes, (1906) (memorandum).
 Cole, Ejectment.
 Colvin, D. Leigh, Prohibition in U.S.A. (1936).
 Cooley, Thomas M., Law of Torts (3rd Ed.), 2 Vols.
 Copinger, W.A., Law of Copyright (6th Ed.).
 Coulson, H.J.W. and Forbes, V.A., Law of Waters (4th Ed.).
 County Courts Rules.
 Craies, W.F., Statute Law (3rd Ed.).
 Dibble, G.B., The Newspaper (Home University Library).
 Dicey, A.V., Law of the Constitution (8th Ed.).
 „ „ Law and Public Opinion in England.
 Dillon, Municipal Corporations.
 Encyclopaedia Britannica.
 Farnham, Waters.
 Fifoot, C.H.S., English Law and its Background, 1932.
 Finlayson, Review of Authorities as to Repression of riot or rebellion, 1868.
 Fraser, Sir Hugh, Libel and Slander.
 French Civil Code.
 Gale, C. J., Easements (10th Ed.).

- Garrett, Nuisances, (3rd Ed.).
 Gatley, C., Libel and Slander (2nd Ed.).
 Gest, G.M., Lawyer and Literature.
 Goddard, J.L., Easements (8th Ed.).
 Goodeve, L.A., Personal Property.
 Goodhart, A.L., Essays in Jurisprudence and the Common Law
 Halsbury, Lord, Laws of England.
 Hamilton, C., Hedaya.
 Hanbury, H.G., Equity.
 Harrison, D., Law of Conspiracy.
 Hart and Hart, Local Government.
 *Harvard Law Reviews.
 Haslam, A.L., The Law Relating to Trade Combinations (1931).
 Hawkins, W., Pleas of the Crown.
 Hewart, Lord, New Despotism.
 Holdsworth, Sir William, History of English Law, 9 Vols.
 Holland, T.E., Jurisprudence (13th Ed.).
 Holmes Jr., O.W., The Common Law (1911).
 Hunter, W.A., A Short History of the Roman Law (4th Ed.).
 Ilbert, Sir C., Government of India (3rd Ed.).
 Jenks, E., Book of English Law.
 „ History of Politics.
 „ Law and Politics in the Middle Ages.
 „ New Jurisprudence.
 „ A Short History of the English Law.
 Jeremiah Smith, Selected Essays on Torts.
 Joyce, H.C. and Joyce, J.A., Nuisance.
 Justinian, Institutes.
 „ Digests.
 „ Novels.
 „ Pandects.
 Kales, A.M., Cases on Contracts and Combinations in Restraint of Trade, 2 Vols
 Kenny, C.S., Cases on the Law of Torts (5th Ed.).
 „ Outlines of Criminal Law (12th Ed.)
 Kerly, Trade Marks.
 Kerr, R. M., Action at Law (3rd Ed.).
 Kerr, W.W., Fraud and Mistake (6th Ed.).
 Kinney, Irrigation.
 Law Quarterly Reviews.
 Lewin, T., Law of Trusts (13th Ed.).
 Lindley, Lord, Companies (5th Ed.).
 Mahaffy and Dodson, Law Relating to Motor Cars (2nd Ed.).
 Maine, Sir H.S., Ancient Law (Edited by Sir F. Pollock).
 „ Early History of Institutions (7th Ed.).
 Maine, Sir H.S., Early Law and Custom.
 Maitland, F. W., Collected Papers (Edited by H. A. L. Fisher).
 „ Equity.
 „ and Montague, F. C., A Sketch of English Legal History.
 Marsden, Collisions at Sea.
 May, Sir T. E., Constitutional History of England, 3 Vols.
 Mayne, Criminal Law.
 „ Damages (10th Ed.).
 „ Hindu Law and Usage (10th Ed.).
 McNair, Law of the Air, 1932, (Tagore Law Lectures, 1931).
 Moore, Act of State.
 Nathan Issacs, Selected Essays on Torts.
 New English Dictionary.

- Newell, M.L., Slander and Libel (3rd Ed.).
 Odgers, Blake, Common Law (3rd Ed.).
 „ Libel and Slander.
 Peacock, F., Easements in British India (3rd Ed.).
 Pearce, E. H. and Meston, D., Nuisances.
 Pollock, Sir Frederick, Fraud (Tagore Law Lectures).
 „ „ Law of Torts (13th & 14th Eds.).
 „ „ and Maitland, F.W., History of the English Law (2nd Ed.), 2 Vols.
 „ „ and Wright, R. S., Possession.
 Pritchard and Nasmith, History of Roman Law.
 Priyanath Sen, Hindu Jurisprudence (Tagore Law Lectures).
 Radcliffe, R. V., Cases on Torts.
 Rajagopala Iyengar, N., Commentary on the Government of India Act.
 Ringwood, Outlines of the Law of Torts (2nd Ed.).
 Robinson, Public Authorities and Legal Liability.
 Roby, Roman Private Law, 2 Vols.
 Rolle, Abridgment.
 Rules of the Supreme Court.
 Ruling Case-Law (American).
 Sacred Books of the East (Ed. by MaxMuller).
 Salkowski, Roman Private Law.
 Salmond, Sir John, Jurisprudence (9th Ed. by W. T. S. Stallybrass).
 „ Law of Torts (7th Ed.).
 „ and Winfield, P.H., Law of Contracts.
 Sanders, Institutes of Justinian.
 Schofield, W., Selected Essays on Torts.
 Schuster, Ernest, J., Principles of German Civil Law.
 Sedgwick, T., Damages (9th Ed.), 4 Vols.
 Selected Essays on Torts (Harvard Law Review Association).
 Shearman, T.G., and Redfield, A.A., Negligence (6th Ed.), 3 Vols.
 Sherman, Roman Law in the Modern World.
 Smith's Leading Cases (13th Ed.), 2 Vols.
 Smith, C.M., Master and Servant (8th Ed.).
 Stephen, Sir James Fitzjames, Digest of Criminal Law of England.
 „ History of the Criminal Law of England, 2 Vols.
 Stone and Ramaswamy Iyer, Pleadings.
 Story, Equity (3rd Ed.).
 Street, T.A., Foundations of Legal Liability, 3 Vols.
 Stroud, Judicial Dictionary.
 Stubbs, W., Select Charters.
 Tarring, Sir C.J., Law Relating to the Colonies.
 Thayer, Selected Essays on Torts.
 Thomas, E.C. and Bellott, Leading Cases on Constitutional Law (6th Ed.).
 Veeder, Anglo-American Essays on Legal History.
 Vinogradoff, Sir Paul, Outlines of Historical Jurisprudence, 2 Vols.
 Viramitrodaya. (Calcutta Ed.).
 Vyavahara Mayukha.
 Walton, F.P., Introduction to Roman Law (4th Ed.).
 Webb, S. and Webb, B., History of Trade Unionism.
 Wigmore, Anglo-American Essays on Legal History.
 Wigmore, J. H., Select Cases on the Law of Torts (1912), 2 Vols.
 Williams, John, Real Property (24th Ed.).
 Wilson, Sir R.K., Anglo-Muhammadan Law (6th Ed.).
 Winfield P. H., History of Conspiracy and Abuse of Legal Procedure.
 „ Province of the Law of Tort (Tagore Law Lectures).
 „ Law of Tort.
 Woodfall, W., Landlord and Tenant (20th Ed.)

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THE LAW OF TORTS

CHAPTER I

· INTRODUCTORY

1. **Law of Torts.**—This is the branch of law governing actions for damages for injuries to certain kinds of rights, like the rights to personal security, property and reputation. The award of pecuniary reparation for such injuries was the subject of regulation by the laws of all communities, ancient and modern. In England the rules regarding it had been slowly developed by the Courts during several centuries. After the middle of the nineteenth century these rules had to undergo a process of great expansion to meet the needs of an urban and industrial civilisation. The invention of the steam engine and the motor car, the development of industry and commerce, the growth of large and crowded cities, the rise of the modern newspaper, and in more recent years the invention of air-craft and the wireless have brought many advantages to the citizen but have also increased the chances of injury to his private rights. This branch of law has therefore attained great proportions and attracts a very large amount of litigation in England and in the United States, though not to the same extent in India. It is still in the process of development and adaptation to the conditions of a changing world. It is a live and growing branch of law and, as its main theme is the definition of the individual's rights and duties in conformity with prevalent standards of reasonable conduct and public good and convenience, it is of profound interest to the student of law and of the social sciences.

2. **Tort.**—The word 'tort' means in law a wrong or injury which has certain characteristics, the most important of which is that it is redressible in an action for damages at the instance of the person wronged or injured, *e.g.*, assault, libel, trespass, nuisance. It is a French word which means, in its etymological sense, a 'twisting out' and in a popular sense, a crooked act, a transgression from straight or right conduct, a wrong.¹ In this generic sense, it was introduced into the terminology of English law by the French-speaking lawyers and judges of the courts of the Norman and Angevin Kings of England.² It was in these courts that the foundations of

1. It is an interesting coincidence that the Sanskrit word 'Jimha,' which means 'crooked,' was used in an ancient Hindu Law text in the sense of 'tortious or fraudulent conduct'; see the text of Narada cited in Priyanath Sen, *Hindu Jurisprudence*, p. 211.

2. It was used by Britton, a legal writer during the end of the 13th century, as the title of a chapter on some of the smaller offences, "*De plusours tortz.*" Bracton, the famous judge and writer of the middle of that century, did not use the word, but used '*injuria*' and '*transgression*'; see P. and M., *H. E. L.*, Vol. II. p. 512, note (2).

modern English Law were laid during the twelfth and thirteenth centuries. The state of the law in England prior to the Norman Conquest¹ was rudimentary and primitive. After the Conquest, French became the spoken language of the courts, and the language of legal treatises and of reports of judicial proceedings for a number of centuries.² Thus it happens that most of the technical terms of English law are French in origin.³ The word 'tort' was at one time very near passing into literary use as a synonym for wrong.⁴ Even in law it was an obscure term till the middle of the seventeenth century. It was then that the practice began, in the courts of common law, of distinguishing between actions in 'contract' and actions for other wrongs, and of using the word 'tort' as a compendious title for the latter class of actions. Since then it was usual to speak of "actions in contract" and "actions in tort."⁵ Thus the word became a term of the law with a restricted application to a particular class of wrongs. But it was really after the middle of the last century when the law of torts was regarded as a separate division of law that the word obtained its modern currency. We will see presently that it still bears the impress of the circumstances in which it came to be used three centuries ago.

3. Definition of a 'tort'.—It is generally recognised that it is not possible to frame any precise or scientific definition of a tort.⁶ It has been defined, for instance, as "a wrong independent of contract, for which the appropriate remedy is a common law action,"⁷ i.e., an action which would have been entertained by the old courts of common law, before the

1. A.D. 1066.

2. English was made the spoken language of the courts by a statute of Edward III in 1362, but French lingered for a long time afterwards as the language of reports of judicial proceedings and treatises until 1650, when it was prohibited by a statute of the Commonwealth. Latin was the language of court and official records till English took its place by a statute of 1731; Holdsworth, Vol. II, pp. 477-482.

3. Maitland, *Collected Papers*, Vol. II, p. 437: "How shall one write a single sentence without using some such word as 'debt,' 'contract,' 'heir,' 'trespass,' 'pay,' 'money,' 'court,' 'judge?' But all these words have come to us from the French. In all the world-wide lands where English law prevails, homage is done daily to William of Normandy and Henry of Anjou." P. & M. Vol. I, pp. 80, 81: "'Right' and 'wrong' we have kept, and, though we have received '*tort*,' we have rejected '*droit*': but even law probably owes its salvation to its remote cousin, the French *loi*."

4. Pollock, *Torts*, p. 1, and his note on that word in the *Encyclopaedia Britannica*; also the note on that word in the *New English Dictionary*, Vol. X.

5. E.g., *Rich v. Pilkington*, (1688) Carth, 178, below, para 16.

6. Addison, *Torts*, p. 1; Street, *Foundations of Legal Liability*, Vol. I, p. 25.

7. Clerk & Lindsell, *Torts* (8th Edn.), p. 1. The Common Law Procedure Act, 1852, defined a tort as a 'wrong independent of contract.' Wigmore, the well-known American writer, disapproved of the term 'tort' and would substitute 'general rights' as the title of the subject; see his preface to *Select Cases on the Law of Torts*, Vol. I. See also Holmes, *The Theory of Torts*, 44 Har. L. R. 773, 781.

Judicature Act, 1873.¹ This can hardly claim to be a definition of a legal concept. It comes down from a period of legal evolution when the procedural features of a tort claimed more attention than the jurial. Dr. Winfield has made a critical examination of many possible or current definitions and the one suggested by him is as follows: "Tortious liability arises from the breach of a duty primarily fixed by the law: such duty is towards persons generally and its breach is redressible by an action for unliquidated damages."² This is more informative than the previous definition and perhaps supplies a good working rule in many cases but as the learned author himself recognises,³ it cannot claim to be precise. For instance the phrase "duty towards persons generally" is rather vague. It is hardly adequate, on the one hand, to include duties arising from special relationships like carrier and passenger, or doctor and patient, or on the other, to exclude duties between trustee and beneficiary, or guardian and ward, which fall outside this branch of law.⁴ Besides it is not wide enough to include cases of absolute liability such as that of an employer for the tort of his servant. Such liability is tortious in the sense that it pertains to the branch of law conventionally known as the law of torts but it would not be accurate to say that it arises from a breach of duty by the employer to the person injured by his servant. The difficulty in defining a tort is due to the fact that the term was chosen not to signify any definite legal concept but rather as a convenient title or caption for wrongs for which a particular class of remedies or forms of action was allowed under a judicial system and procedure that are now defunct. Those wrongs, however, are diverse in their legal constituents and cannot be comprehended in a simple or concise formula. This circumstance does not signify any difficulty in understanding this branch of law. Indeed it has been well taught and expounded by several text-writers, notably Sir Frederick Pollock, Sir John Salmond and more recently, Dr. Winfield, not to speak of many others who have examined different aspects or sections of it. Instead of attempting to define a 'tort' we may state its main characteristics as follows :—

- i. When it is said that a person has committed a tort, what is meant is that he has committed a violation of some right of another or a breach of some duty towards that person. The

1. 36 & 37 Vict., c. 66. It came into operation on 1st November, 1875. See also the Judicature Consolidation Act, 1925; 15 & 16 Geo. 5, c. 49.

2. Province of the Law of Tort (Tagore Law Lectures), 1931, p. 32; Law of Tort, p. 6. It has been adopted by the learned editors of Clerk and Lindsell, Torts (9th Ed.).

3. *Ibid*, p. 229.

4. Besides, there is also the difficulty that the requirement of unliquidated damages does not appear to be adequate to distinguish a tort from a breach of trust; below, paras. 9 and 13.

right and duty arise under the general law as between all persons or persons in particular situations. A tort differs from wrongs which are regarded wholly as breaches of contract.

ii. It is redressible in a civil action for damages, and differs from wrongs which are wholly criminal.

iii. It was redressed by an action in the common law Courts before 1875 and differs from wrongs which were redressed exclusively in other courts, *e.g.*, the Court of Chancery.

It will be convenient to discuss the points of distinction here indicated in the following order :—

(a) tort and crime ;

(b) tort and wrongs for which there was no remedy by an action for damages in the courts of common law ;

(c) tort and breach of contract.

4. Tort and Crime.—A tort differs from a crime both in principle and in procedure.¹ A tort is an injury or breach of duty to an individual for which he is entitled to get reparation from the wrong-doer, while a crime is regarded as a breach of duty to the public as a whole for which the offender is punished by the society or the state. An injury is both a tort and a crime when it is a breach of both these duties, *e.g.*, assault, libel, theft. Sometimes an injury may be regarded only as a crime and not as a tort ; for instance, a public nuisance like an obstruction of a highway is an offence, but no action for damages will lie unless the plaintiff has sustained special damage. Conversely, an injury may be only a tort and not a crime when it lacks the element of danger to public interests, *e.g.*, innocent or mistaken trespass to land. Whether a certain conduct is worthy of punishment or reparation is a matter of legal and social policy. In many important matters the policy is well-settled as in the case of serious injuries to person and property which are both punishable and actionable, but there is a large margin of cases where the policy responds to the changing needs of time, place and circumstance. Modern legislation like the Municipal and Public Health Acts, makes many things punishable which were not so before. Slander is a punishable offence in India but not in England. In parts of India where Prohibition Acts were in force, selling or drinking liquor was a crime. The Fatal Accidents Act of 1846 in England permitted for the first time an action for damages against a person causing the death of another while there was no such remedy before. Since the middle of the last century the liability of employers

1. For a discussion of the distinction, see Kenny, *Outlines of Criminal Law* Chap. I.

for the torts of their servants has received considerable extension. This largely explains the difficulty of framing any more precise definition of a tort or crime than that a tort is a wrong for which the law allows an action for damages, and a crime is conduct which the law regards as deserving punishment.

Secondly, a tort differs from a crime because the remedy for the former is an action for damages by the aggrieved party in a Civil Court, while the remedy for the latter is a prosecution in a Criminal Court by the King who is in theory the prosecutor, though the prosecution may be at the instance of the injured party. The object of a civil action is private reparation and satisfaction, and that of a criminal prosecution is punishment with a view to promote public interests by prevention of offences.¹ This method of stating the distinction is broadly true but admits of qualifications. Sometimes damages in a civil action for a tort are awarded as a measure of punishment and prevention, *e.g.*, in an action for seduction or for gross libel; and in a criminal proceeding part or whole of the fine may be ordered to be paid to the complainant or other injured party by way of compensation.² Besides, from the point of view of legal philosophy, the ultimate purposes of civil and criminal remedies are not clearly severable. The award of damages also promotes public interests by prevention,³ and punishment may afford satisfaction to the injured.

5. Historical development of the distinction between tort and crime.—The distinction between tort and crime belongs to a comparatively mature stage of civilisation and social order. The laws of primitive communities were concerned mainly with the payment of pecuniary reparation to the person injured and allowed private composition of even grave crimes like homicide and serious bodily harm. To quote the famous observation of Sir Henry Maine, "the penal law of primitive communities was not the law of crimes but the law of wrongs or torts."⁴ The system of pecuniary composition was itself an advance on a condition of total lawlessness and barbarity when the "blood-feud" or private war at the instance of the person wronged or his kindred on the wrong-doer and his kindred was a

1. Kenny, *Outlines of Criminal Law*, p. 15: "Crimes are wrongs whose sanction is punitive and is remissible by the Crown, if remissible at all."

2. Cr. P. Code, S. 545; in England, see the Criminal Justice Administration Act, 1914, S. 14.

3. Bentham's Works, Vol. I, pp. 299, 373: "The Civil Code is at bottom only the Penal Code under another aspect"; "satisfaction is still more necessary to cause evils to cease. It tends to diminish the number of offenders."

4. Maine, *Ancient Law*, p. 379. This has been criticised on the ground that primitive laws were really penal; *e.g.*, Jenks, *II.E.L.*, p. 14. The gist of Maine's dictum is that primitive laws allowed composition for wrongs which only at a later age became punishable by the State and unemendable; and this is not open to challenge.

normal affair.¹ The Anglo-Saxon laws² had not advanced very far beyond the stage of legal evolution marked by a system of private composition for murder and other serious crimes.³ They were mostly concerned with the recital of the customary amounts payable for various kinds of injuries, viz., '*wer*' or the price set on every person according to his rank which was payable by the person causing his death, and '*bot*' which was payment for personal and other injuries. But they also contained the germ of the modern 'crime' in the provision that in some cases a '*wite*' or fine was payable to the King or lord.⁴ In the archaic system of justice which the Anglo-Saxon laws disclose⁵, they bear a close resemblance to the codes, known as the *Leges Barbarorum* of the Teutonic tribes on the continent.⁶ English law during the six centuries before the Norman Conquest was practically unaffected by the influence of the mature jurisprudence of Rome, notwithstanding the Roman occupation⁷ of England for three centuries before the fifth, or the promulgation of Justinian's Codes in Eastern Europe during the sixth century.⁸ It was after the Norman Conquest and during the reign of strong rulers like Henry II that Courts were established which could punish all forms of violence as offences against the King's peace instead of allowing them to be compounded as private wrongs. Indeed, these Courts began by showing their strength by awarding punishments and amercements indiscriminately, and even for civil causes of action.⁹ It was long afterwards that the

1. On this subject see Carter, *A History of the English Courts*, pp. 4, 5; Vinogradoff, *Outlines of Historical Jurisprudence*, Vol. I, Chap. X; Jenks, *History of Politics*, pp. 40, 41. These practices are said to be still prevalent in some uncivilised communities in South America and in the Caucasus; F. P. Walton, *Introduction to Roman Law*, p. 219. Their modern manifestation among civilised peoples is the practice of 'lynching'; see Vinogradoff, Vol. I, p. 355.

2. The earliest were those of King Ethelbert (A.D. 600); others were those of Alfred and Canute. They were compiled after the Norman Conquest and known as the *Laws of Edward the Confessor*, the last of the Anglo-Saxon Kings; another compilation during Henry I's reign was known as the *Leges Henrici*.

3. P. & M., Vol. I, pp. 46, 47; Vol. II, p. 451; Maitland and Montague, *A Sketch of English Legal History*, p. 20.

4. See Pollock's *Notes to Maine, Ancient Law*, p. 407.

5. Jenks, *Law and Politics in the Middle Ages*, p. 32: "At the time of the Norman Conquest, England is from a legal standpoint, the most backward of all Teutonic countries, save only Scandinavia. Evidently, English Law was even at the beginning of the twelfth century in a very rudimentary state."

6. These tribes were the parent stock of the Anglo-Saxon people who colonised England in A.D. 449. The invasion of the Danes, another Teutonic tribe, was in the 9th century.

7. It came to an end in A.D. 407.

8. A.D. 529-564. See below, para. 22.

9. P. & M., Vol. II, pp. 519, 572.

theory of punishment assumed its modern form. It is worthy of note that in spite of the high degree of development which Roman Law attained in the sphere of private law, its law of crimes continued to be imperfect,¹ and to the last, theft was not, save in some special cases, a punishable crime but only a delict or private wrong.²

The distinction between civil and criminal procedure came much later than that between reparation and punishment. The famous action of trespass which was introduced in the thirteenth century was in origin both a civil and a criminal proceeding and ended in both damages and punishment.³ In course of time the criminal 'indictment' became separate from the civil action.

6. **Torts and wrongs for which there was no remedy by an action for damages in the old courts of common law.**—Under this head we shall deal in the first place, with the courts of common law, secondly, with wrongs which were redressed exclusively in other courts, and lastly with 'actions for torts' and 'damages.' The courts of common law at the time of their abolition in 1875 were three in number, *viz.*, the court of Queen's Bench, the court of Common Pleas and the court of Exchequer. From these courts of original jurisdiction, appeals lay to the court of Exchequer Chamber.⁴ The foundations of the constitution and procedure of these three courts were laid during the reign of Henry II in the twelfth century. At the time of the Norman Conquest, England was covered with a network of numerous local courts like the courts of the county and the hundred, and many rival and competing jurisdictions of feudal lords and landowners. These courts administered the varying customs of the district or other locality.⁵ The King and his assembly of leading men exercised judicial powers only in rare and exceptional cases. Under the strong rule of the Norman Kings their judicial functions increased. But it was by the reform⁶ of Henry II who appointed a small

1. Hunter, Roman Law, p. 1064; see also Maine, Ancient Law, Chap. IX; Holland, Jurisprudence, p. 379.

2. Institutes, Lib. IV. Tit. I & II; Hunter, Roman Law, p. 1070; Buckland, Roman Law, p. 579; below, para. 22. The law in ancient Greece was similar; see Vinogradoff, Vol. II, pp. 176, 196.

3. It continued to be so in theory till as late as 1694; Pollock, Torts, p. 590. The Scotch procedure had a compound action for punishment and damages for libel; Spencer Bower, A Code of Actionable Defamation, p. 433.

4. This was constituted by various statutes the last of which was (1830) 11 Geo. IV. 1 Will. IV. c. 70, s. 8; it was composed of the judges of all the three courts.

5. There were broadly three sets of customs, *viz.*, the Dane Law, the Mercian Law and the Wessex Law.

6. It was made in A.D. 1178; P. & M., Vol. I, p. 153. In 1176, he had appointed itinerant justices to go round the country.

body of five men¹ to hear all the complaints of the kingdom that England got her first judicature in the modern sense, *i.e.*, a body of learned men "who do justice habitually."² This court was known as the King's court, and also as the *Curia Regis*—a name which was also used to refer to the King's Council of leading men and officials of which the King's court was in origin a judicial branch. The law administered in the King's court came to be known as the 'common law'³ as it was common to the whole country unlike the varying customs prevailing in the other courts. In course of time, the increase of business in the King's court and the convenience of suitors required the separation of that court into two tribunals, *viz.*, one court which always sat at Westminster⁴ to decide disputes between the King's subjects, and another court which was presided over by the King and followed him. The one came to be known as the court of Common Bench and later on, as the court of Common Pleas; and the other as the court of King's Bench. The court of Common Pleas heard actions between subject and subject. The King's Bench heard all serious criminal cases called "Pleas of the Crown" and entertained also civil actions for trespass which was accompanied by the use of force and was against the 'King's peace,' and actions in which the King and his officers were interested. The court of King's Bench was at a later time dissociated from the person of the King who ceased to attend or preside over it, and became like the court of Common Pleas another court of common law with a set of professional judges. The Exchequer was originally only an office for collecting the King's revenue and was the financial side of the *Curia Regis* as the King's court was its judicial aspect. It decided questions arising between the King and the tax-payers about rates, assessment and the like. In course of time the judges of the King's Bench as well as the officers of the Exchequer known as 'Barons' of the Exchequer, adopted various devices⁵ to attract to themselves the civil litigation that belonged to the court of Common Pleas,⁶ until at last these three courts

1. Two clerics and three laymen. Ranulf Glanvill whose name was associated with the first treatise on the English Law was one of Henry's first Chief Justiciars; P. & M., Vol. I, pp. 164, 165.

2. P. & M., Vol. I, p. 154.

3. It was a variation of the phrase '*jus commune*' used by the canonists to distinguish the general and ordinary law of the universal church both from rules peculiar to this or that provincial church, and from papal privileges; P. & M., Vol. I, p. 176. At a later day the 'common law' is distinguished from the law of the church or the canon law.

4. The Magna Carta required this court not to move with the King, as King John often went out to Europe.

5. The writ of *Quominus* in the Court of the Exchequer and the *Bill of Middlesex and Latitat* in that of the King's Bench. In these proceedings a free use of fictions was allowed; Holdsworth, Vol. I, pp. 240, 219-222.

6. The judges of that time had a share in the fees paid by litigants and hence this competition for work; Holdsworth, Vol. I, p. 254.

became courts of concurrent original jurisdiction and came to be known as courts of common law. They were abolished and merged in the present High Court of Justice by the Judicature Act. They had from their inception two distinctive features which had a profound influence on the course of English law, *viz.* :

- (a) the original writ, and
- (b) trial by jury.

7. **The Original Writ.**—A writ¹ is a formal order from the King to an officer or a private person enjoining some act or omission. It need not be necessarily connected with courts of justice, *e.g.*, a writ to convoke Parliament or hold an election. The original 'writ' was an order of the King issued by the Chancellor or his office known as the Chancery and summoning the defendant to appear in the King's court or the later common law courts and show cause against the plaintiff's complaint. It was 'original' because it initiated proceedings in those courts and was therefore distinguished from 'judicial writs' which were issued in the course of a proceeding, *e.g.*, to summon a juror or a witness. It came to be regarded as the royal warrant to these courts to entertain a cause and as the foundation of their jurisdiction. This was due to the circumstances in which the King's court had its origin. In establishing a strong and central court of justice, Henry II made use of the 'writ' for enabling parties to seek its aid in preference to the local and baronial courts to which most litigation then belonged by custom. As the writ in effect took away a cause from one of the rival courts, it was regarded as essential to enable the complainant to have his cause heard and to compel the defendant to answer in the King's court. As the justice of this court was more efficient and began to be appreciated, the demand for writs increased and they were obtained from the Chancery at prices varying with the nature of the writ. For about a century from the time of Henry II, new writs were freely issued for providing remedies for new classes of cases. But this process came to a premature end by the middle of the thirteenth century on account of the opposition of feudal nobles and barons. In 1258 after the Barons' War they were able to get the King (Henry III) to agree to a provision² that the Chancellor should not issue writs other than *writs de cursu*, *i.e.*, writs which were customary and could issue as 'of course', without the approval of the King and his Council. During the reign of

1. Its synonym in Latin is *brevis* or *breve*, so called from its briefly expressing the intention of the framer. For an interesting thesis on this word and its legal history, see the Encyclopædia Britannica, Vol. 28, p. 847. The Register of Writs was known as *Registrum Brevium*. Fitzherbert's *New Natura Brevium* (Nature of Writs) is a well-known commentary and was published in 1534.

2. The Provisions of Oxford; see Stubbs, *Select Charters*, 389. The last years of Henry III (A.D. 1216-1272) have been called the 'golden age of the forms' as the number of writs was at its maximum; see P. & M., Vol. II, p. 565.

Edward I.,¹ the famous Statute of Westminster II² (A. D. 1285) partially restored the writ-making power of the Chancery, by enacting that if "a writ is found in one case but none is found in like case falling under like law and requiring like remedy," the clerks of the Chancery shall make one. But this power could be exercised only in a limited class of cases, *viz.*, those which fell under a like law. At this time the constitution and powers of Parliament were taking shape and the invention of new remedies for new cases was regarded as the province of the legislature and not that of the courts. The writs became not merely limited in number but also crystallized in form. It was the practice of the clerks in the Chancery to state in the writ the subject-matter of the complaint in precise and formal language. The writs already issued were classified according to their subject-matter, and copies were preserved so that the clerks who usually drafted them could use old forms for new cases.³ The result was that a plaintiff whose case would not fit into the formula of one of the writs already in use could not seek the aid of the King's court, or, in the modern phrase, had no 'cause of action.' As the plaintiff's statement of his claim usually adopted the language of the writ, forms of action acquired a rigid and formulary character. It was by a series of statutes in the last century that all this was changed. An action is now commenced not by different kinds of original writs but by a uniform writ known as a writ of summons.⁴ Forms of action have been abolished⁵ and a plaintiff is not bound to adopt any set formula in his plaint or statement of claim, but may state the material facts in appropriate language.

8. Trial by jury.—Trial by jury has for several centuries been the mode of trial of civil and criminal cases in the courts of common law. In recent years, however, the power of the judge to dispense with a jury in civil actions for damages has been enlarged.⁶ In a trial by judge and jury, questions of fact are decided by the jury, and questions of law by the judge.⁷ The system of trial by jury owes its origin to certain measures adopted by Henry II for making his court more popular and effective.⁸ He introduced the system which at that

1. (A.D. 1272-1307). He has been called 'the English Justinian' by reason of his legislative activity over the whole field of law: Holdsworth, Vol. II, p. 292; for a list of his legislation, *ibid.*, pp. 300, 301.

2. 13 Edward I, c. 24; Winfield, Province, p. 12.

3. P. & M., Vol. I, pp. 95-6.

4. This was enacted first by the Uniformity of Process Act, 1832, 2 Will. IV, c. 39 and repeated by later statutes like the Common Law Procedure Acts and the Judicature Act. But even during the 18th century the original writ had become an imaginary proceeding and was supposed by fiction to have been issued; Kerr, Action at Law, p. 193.

5. The Common Law Procedure Act, 1860.

6. Administration of Justice Act, 1933, S. 6; R.S.C., O. 36, rr. 2-6.

7. As to the limitations of this doctrine, see Holdsworth, Vol. I, p. 298.

8. P. & M., Vol. I, p. 140.

time was known as the 'inquest' or inquiry by a group of neighbours on oath for the purpose of apprehending suspected criminals, and for deciding certain classes of disputes, *e.g.*, claims to possession and ownership of land, claims of the Church to land as a religious endowment.¹ The inquest was in vogue with the Frankish Kings in Western Europe and was copied from them by the Norman rulers for ascertaining their rights and privileges. The innovation consisted in introducing the inquest as an adjunct of the law courts. The modes of trial which were prevalent at that time and which had come down from the Anglo-Saxon period were of a primitive kind. They were: (a) *Ordeal*. It proceeded on the belief that God would intervene by a sign or miracle to determine questions at issue between two contending parties. The person who could carry red-hot iron, or plunge his hand or arm into boiling water, or sink when thrown into water was deemed to have right on his side.² (b) *Compurgation or wager of law*. This consisted of the oath of a number of witnesses who swore not to the facts in issue, but in the prescribed formula to the credibility of one of the parties. Their oaths were not evidence in the modern sense and were not to be weighed by the courts, but concluded the decision if a set of men swore in the prescribed form. (c) *Duel*. After the Norman Conquest trial by duel or battle was also in vogue. According to the system of justice which allowed these practices, the judge who presided in the local or customary courts, like the sheriff, did not decide a cause in the modern sense by receiving and weighing evidence, but was rather in the position of an umpire who saw that the rules of the game were followed. The decision followed as a matter of course on the oath of witnesses or the result of the duel or ordeal.³ The new mode of trial by inquest became popular and was a means of removing causes to the King's court from the local courts where the older practices prevailed. At first the jury were in the position of witnesses summoned from the neighbourhood who swore to facts within their knowledge. It was at a later period that they acquired their modern role of judges. The older modes of trial fell into disuse and were superseded by trial by jury.⁴ Some of them like duel and compurgation remained in theory as part of the law till they were abolished by statute in the last century.⁵

1. He did this by means of regulations known as the Assizes, *e.g.*, the Assize of Clarendon (regarding apprehension of criminals), the Grand Assize (disputes about rights in land), the Assize Utrum (disputes about ecclesiastical property).

2. Holdsworth, Vol. I, p. 310.

3. Holdsworth, Vol. I, p. 299; Maitland, Equity, pp. 308, 309.

4. The ordeal disappeared at an early time under Christian influence and was prohibited by the Lateran Council in A.D. 1215.

5. The 'battle' and 'compurgation' were described at length by Blackstone in the 18th century; III, 336-348. 'Battle' was claimed in an 'appeal' of murder, *Ashford v. Thornton*, (1818) 1 B. & Ald. 457, and was thereupon abolished in 1819 (59 Geo. III, c. 46); 'compurgation' was abolished in 1833 (3 and 4 William IV, c. 43, S. 13).

9. Wrongs which were redressed exclusively in other Courts.—

(a) Among such wrongs the most important were breaches of trust and of other equitable obligations by a trustee, executor or guardian. These were redressed in the court of Chancery.¹ This court took its name from the Chancellor who was originally only a minister of the King, but in course of time acquired judicial functions in various cases. This was due chiefly to the rigidity of common law writs and forms of action² and the consequent denial of justice in many cases. After many conflicts³ with the courts of common law the exclusive jurisdiction of the court of Chancery was established over large classes of litigation, *e.g.*, administration of trusts or of estates of deceased persons, infants, lunatics, etc. The Chancellor was not bound by any technical rules but did equity and satisfied his conscience; therefore, his court was known as the court of Equity. This court differed from the common law courts in many important matters. It had no writs or forms of action but entertained complaints by petitions or 'bills.' It had no trial by jury. In course of time it developed a distinct code of principles, had its own precedents, employed a distinct terminology and had a separate Bar and Bench. The Judicature Act abolished these rival courts and empowered the High Court in all its divisions⁴ to administer both law and equity. But in spite of this fusion of the common law and equity courts, the principles and precedents that had grown in these courts cannot be easily assimilated. Thus a breach of trust or of other equitable obligation may resemble a tort in that it is a breach of duty imposed by the general law and redressed by the award of damages,⁵ but it was and continues to be outside the sphere of a tort.

(b) A breach of a marital obligation, *e.g.*, adultery, is not a tort. It was formerly within the exclusive cognisance of ecclesiastical courts

1. For a history of its origin, see Holdsworth, Vol. I, p. 395; Maitland, Equity, pp. 1-42.

2. Other defects were the unsuitability of the jury trial in cases like actions of account, the tendency of juries to corruption and intimidation, technical rules such as that parties could not be witnesses, etc.

3. The most notable conflict was that in A.D. 1616 between Coke and Lord Chancellor Ellesmere; Carter, History of English Courts, pp. 95, 96; Holdsworth, Vol. I, p. 459.

4. *Viz.*, the King's Bench division, the Chancery division and the Probate, Divorce and Admiralty Division. As to assignment of work to these divisions, see Judicature Act, 1925, S. 56.

5. The court of Equity did not as a rule entertain actions for damages but allowed claims for damages or compensation for loss against trustees and executors in an action for account or in the course of administration of an estate; see Story, Equity, S. 794 (a); Sedgwick, Damages, S. 1256 (A); Lewin, Trusts, pp. 940, 953. These damages would partake of the character of unliquidated damages, as to which see below, para. 13. See however, Winfield, Law of Tort, p. 13.

which in England had a long history¹ and exercised jurisdiction, among others,² over matrimonial causes. The relief afforded by them in the above instance was not damages but divorce. By a statute of 1857³ this jurisdiction was taken away from them and vested in a court known as the Divorce court.⁴ Against the adulterer, however, the husband had formerly an action for damages in trespass in the common law courts.⁵ Since the Act of 1857, this action is no longer available and the only remedy is by making him a co-respondent in a petition in the Divorce court and claiming damages against him.⁶ Thus an injury to the marital relation is not a tort; but an injury to the parental relation, *e.g.*, seduction of a daughter, is a tort as an action for damages has always been entertained by the common law courts.

10. Actions for Torts.—Prior to the Judicature Act the word ‘action’ was the name given to a proceeding in the common law courts, while a proceeding in the court of Chancery was either a ‘bill’ or ‘information.’ Since that Act, the word applies to proceedings in all the divisions of the High Court. Besides, by a series of reforming statutes⁷ ending with the Judicature Act, the forms of action which prevailed for several centuries in the old common law courts were abolished. Since then, a plaintiff in an action for damages for a tort, as in any other action, is not bound to adopt any set words or formula. But in spite of these epoch-making changes, the old common law actions for torts have not lost their importance⁸. The principles which have gathered round the old forms constitute the bulk of the law of torts, and are the source to which we have to look for ascertaining whether in a given case plaintiff has a cause of action. The early common law was primarily concerned with remedies and not with rights

1. Holdsworth, Vol. I, p. 598; Carter, History of English Courts, p. 143.

2. They fell under two heads, crimes by clergymen and spiritual offences, like immorality and sin which included adultery, defamation, breaches of faith or promise. These courts also obtained jurisdiction over the grant of probate and the administration of estates of deceased persons. The latter category of cases was subsequently taken over by the court of Chancery. At the present day the ecclesiastical courts have jurisdiction only in matters of church discipline and ritual, and in cases relating to church property.

3. 20 & 21 Vict., c. 85.

4. It was merged in the Probate, Divorce and Admiralty Division of the High Court by the Judicature Act, 1873.

5. The action was known as the action of criminal conversation; below, Chap. III para. 4.

6. The Indian Divorce Act (IV of 1869) applicable to Christians prescribes (S. 34) a similar procedure.

7. Common Law Procedure Acts, 1852, 1860; see Maitland, Equity, p. 375.

8. “The forms of action we have buried, but they rule us from their graves”; Maitland, Equity, p. 296.

and duties,¹ and has therefore been described as a 'commentary on writs.'² The result was, to use a famous phrase of Sir Henry Maine, that substantive law was gradually secreted in the interstices of procedure.³ A reference to the chief forms of action which were available in the courts of common law for torts is indispensable even at the present day for understanding the case-law. These forms fell into two classes: (a) the action of trespass, and (b) the action of trespass on the case, or action on the case simply.⁴

11. Action of trespass.—The action of trespass⁴ was so called from the name of the writ which commenced it, the writ of trespass. This writ was introduced in the middle of the thirteenth century and was intended to provide an effective remedy in the King's court for persons aggrieved by violent injuries to person and property. It stated the nature of the complaint in the following form⁵ which the plaintiff's declaration invariably adopted:

The King to the Sheriff Greeting:—If *A* gives pledges to prosecute his complaint, then put *B* by gage and pledge that he (*B*) be before our Justices at Westminster [on such a day] prepared to show why with force and arms (*vi et armis*) he assaulted the said *A* at *N* [or broke the close of *A* at *N*, or took and carried away the sheep of *A*] and other enormities to him did, to the grave damage of the said *A*, and against our peace (*contra pacem nostram*).⁶

By the allegations that the injury was 'against our (the King's) peace,' and 'with force and arms,' the complainant was enabled to seek the aid of the King's courts instead of the local and manorial courts before whom such causes went for redress at that time. To us the King's peace is the peace of the kingdom or the whole country, "an environment as necessary and as natural as the air that we breathe."⁷ But in feudal England the King's peace had many competitors and was restricted by area and by time.⁸ A feudal chieftain or a powerful landowner regarded an offence committed within the area under his special protection as an offence against him and

1. "There is no harder lesson for the stranger jurist to learn than that the common law began with the remedy and ended with the right"; Lord Dunedin in *Nocton v. Ashburton*, (1914) A.C. 964.

2. Maitland and Montague, *A Sketch of English Legal History*, p. 99.

3. Maine, *Early Law and Custom*, p. 389.

4. As to the history of trespass, see P. & M., Vol. II, p. 511, etc.

5. Like other official records, it was drawn up in Latin till 1731; Holdsworth, Vol. II, p. 479.

6. Jenks, *H. E. L.*, p. 53; see also Maitland, *Equity*, p. 383.

7. Holdsworth, Vol. II, p. 48.

8. "Until a much later period it will die with the King," Holdsworth, Vol. II, p. 48. The King's Highway had the protection of the King's Peace. Both the phrases are connected in origin, P. & M., Vol. I, p. 44.

his peace and falling within the jurisdiction of his own customary court. As the Kings consolidated their power, the limits of their peace and of their jurisdiction also widened, and the writs became increasingly popular as an instrument of protection against powerful malefactors. The writ was also popular because of its advantages over existing remedies available in the local courts. At that time the chief remedy for serious injuries to person and property was the 'appeal' or accusation.¹ The appellor had to recite his accusation in a set formula at the risk of losing his appeal even by the fault of a syllable. The appellee or accused could offer to wage a duel. If he was respectable and no suspicion attached to him, he could offer a 'wager of law,' or a number of oaths in support of his innocence. The unsuccessful party was liable to punishment which he could redeem by payment of compensation or fine. The appeal was nothing more than the primitive method of vengeance or the 'blood-feud' carried on under judicial sanction and regulation, and was becoming unpopular with the dawn of civilised ideas of justice. The new remedy was intended to take the place of the appeal and did so on account of its superior advantages. While it was free from the technicality and other defects of the appeal like the trial by battle,² it gave the parties the benefit of the new mode of trial by inquest or jury and provided relief by way of punishment of the wrongdoer and also damages to the injured. Its process was speedy and effective as the defendant could be seized and imprisoned if he would not appear, and outlawed if he could not be found. The appeal was, however, reserved for grave injuries called felonies, as in such cases the instinct of vengeance could not then be wholly suppressed, *e.g.*, murder, maim, rape, arson, burglary, larceny³. For a felony the remedy of trespass was in theory not available but in practice was allowed in every case, with the exception of murder, by permitting the plaintiff to omit the words charging a felony in the complaint⁴. In another and perhaps the opposite direction the scope of the new remedy was also extended. It was used even when there was little or no use of force, and the expressions '*vi et armis*' and '*contra pacem*' became common form or fictions. Thus the mere entry of a man into land in

1. As to 'appeals' and their procedure, see Stephen, *History of the Criminal Law*, Vol. I Chap. VIII, p. 244.

2. As the language of the writ resembled that of the appeal except that it omitted the words charging a 'felony' and offering 'battle,' trespass has been called "an attenuated appeal"; P. & M., Vol. II, p. 526.

3. Holdsworth, Vol. II, pp. 257, 358. The appeal soon fell into disuse, except in cases of murder and in course of time was practically obsolete even in such cases. It, however, was formally abolished by statute only in 1819 (39 Geo. III, c. 46) when a person accused of murder sought to revive this rusty legal weapon and challenged the appellor to battle; *Ashford v. Thornton*, (1818) 1 B. & Ald. 405.

4. On this subject, see the judgments in *S. S. Amerika*, (1917) A.C. at 45, 58; below, Chap. II, para. 33.

another's possession or the mere touching of another's person or goods was deemed a trespass for the purpose of the use of this action. The proceeding in trespass had originally both a criminal and a civil aspect¹. At that time the distinction between civil and criminal procedure in the King's court was only in the process of formation. In course of time the distinction became clear between the proceeding known as the 'indictment' for a felony or misdemeanour, and the civil action for damages for trespass². The action of trespass served the function of the principal action for torts in mediæval England. It was the remedy for violent injuries to person or property³ which then required the chief attention of the law courts, and—by a process of extension by means of legal fictions—for various wrongs like even a peaceful or slight interference with the possession of land or goods⁴.

12. Action on the case.—In course of time other types of wrongs called for a remedy in the King's court. Some early instances were cases where a person who was entrusted with the possession of a chattel by the owner injured it by neglect *e.g.*, a ferryman who overloaded his boat with the result that the horses entrusted to him for carriage were drowned,⁵ or a farrier who negligently shod another's horse and injured it.⁶ An action of trespass would not lie against these persons because they did not use force or disturb another's possession. In these and similar cases it became the practice to invoke the power conferred by the Statute of Westminster II on the Chancery to issue writs in like cases, and to sue in an action which came to be known as 'trespass on the similar case,' or 'trespass on the case,' or simply, 'action on the case'.⁷ In course of time the procedure in actions of trespass became distinct from that in actions of trespass on the case and it was necessary to draw the line between the two

1. "The King's courts were approaching the field of tort through the field of crime," P. & M., Vol. II, p. 530. This refers to the evolution of trespass in the 13th and the later centuries and is hardly in conflict with Maine's remark about primitive laws. Jenks, however, thinks otherwise; H. E. L., p. 68.

2. In theory the criminal aspect continued till A.D. 1694, 5 & 6 Will. & M. c. 12; Pollock, Torts, p. 590.

3. For such injuries it had three forms, trespass in assault and battery, trespass *quare clausum fregit*, and trespass *de bonis asportatis*.

4. It assumed special forms for other cases, *e.g.*, taking away a servant or child, criminal conversation, ejectment; as to these, see below, Chap. III, paras. 1 to 4 and Chap. IV, paras. 13 & 14.

5. (1348) Y.B. 22 Ass. fo. 94, pl. 41.

6. (1372) Y.B. 46, Ed. III, fo. 19, pl. 19: for these and similar cases of the time see Holdsworth, Vol. III, p. 430; Jenks, H.E.L., p. 138.

7. The form of the writ was similar to that in trespass except that the phrases, '*vi et armis*' and '*contra pacem*' were often omitted; Maitland, Equity, pp. 360, 384.

actions, as a plaintiff's mistaken choice of one action instead of the other had serious results and involved his losing the action altogether.¹ In *Leame v. Bray*² the distinction was stated to be that trespass lay for a direct injury and case for an indirect or consequential injury; and it was held that injury due to the defendant negligently driving his carriage and causing a collision with that of the plaintiff was a direct injury. In the case of a man throwing a log into a highway, "if at the time of its being thrown, it hit any person, it is trespass; but if after it be thrown, any person going along the road receives an injury by falling over it as it lies, it is case."³ In *Scott v. Shepherd*⁴ the defendant Shepherd, mischievously threw a lighted squib into a market house. It fell on the shed where one Yates sold ginger bread. One Willis, to prevent injury to himself and Yates, caught it and threw it across when it fell on the shed of one Ryal who took it and threw it across, when it struck the plaintiff Scott and exploded and put out his eye. It was held that the injury to the plaintiff was directly and immediately caused by the defendant, as Willis and Ryal, the intermediate agents, acted involuntarily and for self-protection, and that therefore trespass was the proper remedy.⁵ From time to time the courts of common law allowed actions of trespass on the case, or actions on the case,⁶ for new kinds of wrongs or injuries for which remedies were demanded by an advancing civilisation. This they did—largely out of fear of the rival and encroaching jurisdiction of the Chancellor—by a liberal interpretation of the requirement of 'consequential damage.' Thus they allowed actions on the case for defamation, deceit, malicious prosecution, nuisance, negligent injuries to person or property, conversion of goods, etc. In the famous case of *Ashby v. White*⁷ an action on the case was allowed at the instance of a voter in a Parliamentary election who complained that

1. The distinction between the two actions had several practical aspects. They had different mesne processes, e.g., the defendant who did not appear could be arrested or outlawed in trespass and not in case; Maitland, *Equity*, p. 360. Besides if in trespass plaintiff recovered less than forty shillings, he was entitled to no more costs than damages, but nominal damages carried costs in case; Salmond, *Torts*, p. 4.

2. (1803) 3 East, 593; also *Hooper v. Reeve*, (1817) 7 Taunt, 698.

3. Le Blanc, J., in 3 East, at p. 602.

4. (1773) 2 Wm. Black. 892.

5. Blackstone, J., the famous author of the *Commentaries on the Laws of England*, dissented.

6. Maitland, *Equity*, pp. 345, 346. Some writers are of opinion that actions on the case were not always modelled on trespass but also on other older writs like deceit, nuisance, etc.; Jenks, *H.E.L.*, p. 139; Winfield, *Province*, p. 13.

7. (1702) 2 Ld. Raym. 938; 1 Sm. L. C. (13th Ed.), 253. This case is famous in English constitutional history on account of the struggle between the Courts and Parliament which ensued on the decision; Thomas, *Cases on Constitutional Law*, pp. 30, 31; and Birkenhead, *Fourteen Judges*, p. 110. For other instances of similar enunciations of principle, see *Winsmore v. Greenbank*, (1745) Willes, 577; *Pasley v. Freeman*, (1769) 3 T.R. 51; *Chayman v. Pickersgil*, (1762) 2 Wils. 145; *Bowen v. Hall*, (1881) 6 Q.B.1. 333.

the defendants who were the returning officers, had maliciously prevented him from exercising his statutory right of voting in that election. It was contended for the defendants that the action had no precedent and was not maintainable as the plaintiff had not sustained any actual or pecuniary damage consequential on the defendants' illegal conduct. Holt, C. J. overruled these objections and allowed the action¹ on the ground that the violation of the plaintiff's statutory right was an injury for which he must have a remedy and was actionable without proof of pecuniary damage. Some of his observations in this case have become classical :

"If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal."

"Every injury imports a damage, though it does not cost the party one farthing. For a damage is not merely pecuniary but an injury imports a damage, when a person is thereby hindered of his right. As in an action for slanderous words, though a man does not lose a penny by reason of the speaking them, yet he shall have an action. So, if a man gives another a cuff on the ear;—though it cost him nothing, no, not so much as a little diachylon—yet he shall have his action, for it is a personal injury. So, a man shall have an action against another for riding over his ground, though it do him no damage; for it is an invasion of his property."²

*This case is of great importance in the law as it established the principle, *ubi jus ibi remedium*, "whenever there is a right, there is a remedy," or, as it is also sometimes expressed, "there is no wrong without a remedy." It marks a new era of remedial justice because the older tradition was characterised by an extreme rigidity of writs and forms of action and a strict and illiberal exercise of the power conferred by the Statute of Westminster. The older tradition was responsible for denial of a remedy in large classes of cases where justice required it and was a prime cause of the growth of equity jurisdiction. It proceeded on the assumption that where no remedy or known form of action was available there was or could be no right in law.³ This case marks the change that had come over the attitude of the courts of common law. By declaring that they would allow a remedy where they recognised a right, they furnished the law of torts with an elastic principle of development. This development proceeded, till forms were abolished, through the various actions on the case which were allowed from time to time. Since then actions are innominate and pleadings need not contain statements which it is unnecessary to prove, *e.g.*, 'trespass by force and arms' and 'against the King's peace.'⁴

1. He was in a minority in the King's Bench but his judgment was upheld by the H.L.
2. 1 Sm. L.C. pp. 273-275.

3. *Cf.* Stephen, J., in *Bradlaugh v. Gossett*, (1884) 12 Q.B.D. 271, 285.

4. C.L.P. Act, 1853, Ss. 49, 50.

13. Damages.—The damages which a plaintiff has a right to recover in an action for a tort belong to the category known as 'unliquidated damages.' This phrase is applied to cases where a plaintiff claims not a predetermined and inelastic sum but such an amount as the court in its discretion is at liberty to award, though in his pleading, he may specify a particular amount. The phrase 'liquidated damages' refers to a sum which has been predetermined by contract or statute.¹ The right to recover unliquidated damages is an essential and distinctive feature of a tort.² Where that remedy is not, but some other remedy alone is available, the wrong or injury complained of is not a tort, *e.g.*, a public nuisance for which no action for damages will lie in the absence of special damage. Though damages are an essential feature, other remedies may also be available in an action for a tort, *e.g.*, injunction to stop a continuing wrong like libel, trespass, nuisance. Damages are usually intended to be a pecuniary compensation for the injury; they are then called substantial damages. But they may be determined by other considerations also. They may be awarded with a view to punish the defendant as in an action for seduction or gross libel; they are then called exemplary, punitive or vindictive damages. They may be merely nominal when the plaintiff has sustained an injury to his legal right but no actual damage. They are called contemptuous damages, when a farthing or other trifling sum is awarded as a mark of disapproval of the plaintiff's conduct in going to court.

14. Historical development of the principle of unliquidated damages.—The action for unliquidated damages has always been regarded as the great remedy of the common law courts³ but was unknown to early legal institutions in England. The Anglo-Saxon laws, like the laws of many ancient communities in Europe, contained elaborate tariffs of fixed sums of compensation for different kinds of injuries, *e.g.*, 50 shillings for loss of a foot, 10 shillings for loss of a great toe, half of it for each of the other fingers,⁴ etc. These sums were determined by custom and were the prices at which the wrongdoer could escape the wrath of the injured or his kindred. As yet the judge had no power to decide the question of liability or the amount of damages for such injuries. It was really after the introduction of trespass in lieu of the older remedy of appeal that the

1. Arnold, *Damages and Compensation* (2nd Ed.), pp. 5-6. It is different from penalty; *Michael Habib v. Sheikh*, (1941) A.C. 274, 281.

2. The phrase "by way of damages" in a collision clause in a marine insurance policy was held to apply only to a claim in tort and not to one for indemnity in contract; *The Trident*, (1938) 3 A.E.R. 234.

3. "In later days we learn to look upon the action for damages as the common law's panacea," P. & M., Vol. II, p. 523.

4. *Æthelbert's Laws*, see Appx. I to Maitland & Montague, *A Sketch of English Legal History*, p. 198.

naturally obscure the distinction between tort and contract. The growth of trade and commerce and the resulting increase of litigation in contracts made a special form of action for enforcing simple contracts necessary; and courts and pleaders met the situation in their usual manner by converting the old action of trespass on the case into a specialised form known as the action of assumpsit.¹ By the seventeenth century this action had become popular and was in constant use. It was then that the distinction between tort and contract emerged, but it manifested itself in the form of differences in various details of procedure. Thus it was held that unlike trespass or case, the action of assumpsit survived to or against the representative of a deceased party.² Similarly other points of distinction in process and procedure were recognised in decisions of the seventeenth century.³ It is to these decisions which recognised and expressed the antithesis between actions in contract and those in tort that the word 'tort' which had till then only a generic sense of wrong owes its currency in law in its modern sense. Thereafter till the abolition of forms of action in the last century the antithesis continued to be of practical importance to the lawyer,⁴ and the twofold division of personal actions into actions in contract and actions in tort became common learning⁵ and was recognised by cases and statutes.⁶ With the disappearance of forms of action greater attention to juridical principles and distinctions became possible and the difference between a tort and a breach of contract was stated in the form of a distinction in the nature of the right or duty—a distinction which till then lay hidden in the interstices of procedure. Though forms of action and their peculiarities of process and procedure have disappeared, some of the old distinctions in procedure are still of practical importance. Thus under the common law an action on tort generally abates but an action on contract survives on the death of a party to it. It was only in 1934 that the former position has been altered by statute and actions for tort survive with certain exceptions.⁷

17. Implied contract and quasi-contract.—The theoretical distinction between duties arising by consent of parties and duties imposed by the general law serves as the boundary line between the spheres of tort and

1. Below, para. 17; Chap. XIV, para. 61 (a).

2. *Pinchon's case*, (1612) 9 Co. Rep. 86 (d).

3. See Maitland's Historical Note in Pollock, Torts, pp. 453, 458; some of the cases are *Rich v. Pilkington*, (1688) Carth. 171; *Boson v. Sanford*, (1689) 3 Salk. 203.

4. *Brown v. Boorman*, (1844) 11 Cl. & F. 1. It still continues in certain matters like the scale of costs in a County Court; below, Chap. XIV, para. 61.

5. Blackstone, Vol. III, p. 117.

6. E.g., C.L.P. Act, 1852 (15 & 16 Vict. c. 76) schedule of forms; the County Courts Acts from 1846 to 1888; Pollock, Torts, p. 431.

7. Below, Chap. II, para. 40, and Chap. XIX, para. 39.

contract in the modern law. It is, however, blurred and obscure in some parts of that boundary. The two principal instances are implied contracts and quasi-contracts.

(a) *Implied contract*.—In this case the duty is not undertaken by any express contract or consent but imposed by law because consent could be presumed from the conduct of the parties. For instance when a person goes into a hotel and orders food or gets into a public conveyance like a tramcar or bus, he does not expressly consent to pay for the food or the carriage but the duty to pay is inferred or implied from his conduct. Again a duty may be implied as a term of a contract in consonance with its express terms, e.g., the duty of a doctor to possess and exercise due care in an operation on a patient. Similarly in contracts made between attorney and client, bailee and bailor, carrier and passenger, duties of care are implied by law suitably to the nature and terms of the contract in each case. These duties are however really delictual because they arise independently of any contract but on account of the great convenience and popularity of the old action of *assumpsit* litigants were allowed to use it instead of the actions of trespass or case. This popularity was due to procedural reasons to which reference will be made later.¹ Thus various kinds of duties which were imposed by law came to be regarded as contractual and obtained the title of 'implied contract.' The duties with which we are here concerned are those which though really delictual and independent of contract were regarded as contractual and within the province of the law of contracts rather than that of the law of torts.² In these cases an action on the case would lie but an action of *assumpsit* was also allowed and often preferred. In cases where a sum of money was claimed, a special form of *assumpsit* known as *indebitatus assumpsit* was invented and became popular. In this action the plaintiff had to allege an undertaking or promise, e.g., to pay the money due. But the promise was a fiction and became a mere matter of form.

(b) *Quasi-contract*.—In various types of cases a person is under a duty to restore a benefit unjustly obtained by him at another's expense.³

1. Below, Chap. XIX, paras. 39 & 40; above, para. 16.

2. Holdsworth, III, 448. Similarly the mutual duties of lessor and lessee, and landlord and tenant have been long regarded as within the province of the law of real property. The duties of lessor and lessee are defined by the Transfer of Property Act in India.

3. On this subject see the excellent analysis in Winfield, *Province of Tort*, Chap VII; also Street, *Foundations of Legal Liability*, Vol III, Chap XV; Holdsworth, Vol. III, pp. 446, 450; Seavey and Scott, 54 L.Q.R. 29; Lord Wright, 57 L.Q.R. 184. The following three decisions of the H. L. contain all the learning on the subject; *Sinclair v. Brougham*, (1914) A.C. 398, 415, 416, 454; *United Australia Ltd. v. Barclays Bank*, (1941) A.C. 1, (as to which see below, Chap. V, para. 71 and Chap. XIX, para. 39); *Fibrosa v. Fairbairn & Co., Ltd.*, (1943) A.C. 32.

The duty is imposed by law in the interests of justice, *e.g.*, to repay money received by mistake, to restore chattels so received or their value, to pay the value of services rendered by way of salvage. In these and other similar cases it became the practice to use the action of *indebitatus assumpsit* as it was found a convenient remedy. Sometimes the duty may be entirely delictual and may arise from the commission of a tort; for instance when a person commits conversion or deceit he is under a duty to restore the goods converted or obtained by fraud or the value of such goods. To such cases also the above remedy was extended. The plaintiff would waive the tort and sue in contract; in other words, instead of suing in the action of trover or deceit he would sue in the action of *indebitatus assumpsit*. This was due again to the greater convenience of this form of action. As already stated, it was necessary in this action to allege an assumpsit or promise to pay.¹ The pleaders were allowed to do so, though the promise or contract to pay was a fiction. This fiction was far more complete and removed from fact than that in the case of implied contract because here the duty is imposed by law on a person without his consent. Sometimes he may have even refused to receive the benefit which he is made liable to restore, *e.g.*, necessities supplied to a person's wife without his consent or even against his will. Besides in some cases of quasi-contract, unlike implied contract, there could be no contract for want of contractual capacity, for instance, in the case of necessities supplied to a minor or a lunatic his estate is liable to pay their value. In all these cases the use of a contractual form of action for purposes of convenience led to their being regarded as appertaining to the law of contracts and to their being designated by the title of quasi-contract, though they may have no element of contract at all.² In the case of some of them the duty is wholly delictual and properly within the province of the law of torts but by historical accident and the exigencies of old procedure even such cases have come to be classed under quasi-contract and relegated to the province of the law of contracts. In all of them the duty arises under the law³ and not by consent or contract. In that respect quasi-contract is rather analogous to tort than to contract. But it differs

1. There was also an allegation that the defendant was indebted in so much money had and received by him to the use of the plaintiff. The action thus came to be known and is still known as an action for money had and received.

2. See *Moses v. Macfarlan*, (1760) 2 Burr. 1005, 1008, per Lord Mansfield who is said to have done much to foster and generalise this form of action. His use of the term of the Roman Law '*quasi ex contractu*', has perhaps led to its adoption in the English Law.

3. Dr. Winfield considers that the duty in quasi-contract is only to particular persons and not to the whole world and therefore differs from that in tort; Province of Tort, p. 188. With respect, it is difficult to see how the duty of an occupier of property to an invitee or licensee or the duty of a carrier to a passenger is different.

from tort in two respects. First, it may arise independently of the commission of any tort, *e.g.*, money received by mistake, salvage, contribution for common debt discharged. Secondly, the claim in quasi-contract is usually for a liquidated sum of money or the value of chattels or services specified. Even in other cases the compensation asked for is conceived of as a debt for which the form of action mentioned above was appropriate. On the other hand damages for tort are unliquidated and variable by aggravating or mitigating circumstances. In truth quasi-contract is in its juristic conception different from either contract or tort and falls under a separate or third category which, it has been suggested, may be called 'unjust enrichment.'¹ The reason for the present unjust or illogical arrangement by which legal obligations without any contractual element in them and sometimes entirely delictual or tortious are assigned to the sphere of contract is twofold. First, divisions of law were aligned on distinctions between old forms of action, and second, a twofold division of common law actions into contract and tort was formerly convenient and new legal concepts evolved in response to new conditions and needs were assigned to either of them. The heavy hand of history has made this a permanent feature of the English law which has been transferred to codes based on it. Thus Chap. V of the Indian Contract Act deals with quasi-contract and bears the title "of certain relations resembling those created by contract." Due to the entanglement of old ideas the theory of waiver of tort, as we shall see later, generated misconceptions leading to injustice which had to be cleared only in 1941 by the House of Lords.²

18. Real nature of the distinction between tort and breach of contract.—Thus we see that the boundary between tort and contract as these terms are now understood in law, though in the main juridical, is in parts only conventional. The phrase 'independent of contract'³ in the definition of a tort, therefore, means virtually, other than wrongs which are regarded as breaches of contract, and serves to indicate the actual content of these phrases in the modern law. A definition of a tort as a breach of duty arising under the law and of a breach of contract as a breach of duty arising from the consent of parties would obviously be too general, as some breaches of duties of the former description are comprised in the conventional division of law known as "the law of contracts."

19. Tort and moral offences.—A tort is a breach of a legal duty and not a breach of a wholly moral obligation. It is not every wrong in the popular sense that is a tort; the building of a wall on one's land merely

1. (1943) A.C. at p. 62, per Lord Wright; Holdsworth, 55 L.Q.R. 37; Lord Wright, 57 L.Q.R. 184. 2. Below, Chap. V, para. 71; Chap. XIX, para. 39.

3. The phrase does not preclude a tort's dependence on a contract as where it arises on a doctor contracting to treat a patient or on a person procuring a breach of an existing contract between two others.

with a view to obstruct the passage of light to a neighbour's new house may be morally culpable but is not an actionable wrong. The law generally seeks to express the moral sense of the community but between law and morals there have always been points of divergence.¹ Some of them are inevitable as the law has regard in framing its rules not merely to ethical notions but also to practical considerations. Its rules often represent a compromise between conflicting principles or policies. In the case just mentioned the right of an owner of property to use it as he likes prevails over the right of the neighbour to the natural amenities of his house; the former, however, gives way to the latter right, where the neighbour has peacefully enjoyed the light for twenty years. The maxim, *alterum non laedere*,² "To hurt no one", was propounded by Justinian's Institutes as a rule of law but is obviously too broad for practical application. Sometimes the disharmony between law and morals or justice may not be inevitable but may be due to the technicality or the conservatism of the law. Thus till 1846 an action for damages against a person who killed another would not lie at the instance of the latter's widow or children even though they were thus left destitute. This was altered in that year by an Act of Parliament in England. The process of reforming the law by removing its anomalies and making it reflect properly the moral and social sense of the community was a marked feature of the last century. Among the great reformers whose labours and writings contributed to this result Bentham was perhaps one of the foremost.³ The process of law reform has now assumed a more active phase than in the past after the appointment in 1934 by Lord Chancellor Sankey of a Law Revision Committee, some of whose recommendations have been carried out by legislation and made notable changes in the law. Just as some moral offences may not be torts, some torts may not be deemed moral offences as where an innocent employer is made to pay for the fraud or mischief of his servant.

20. Law of Torts in England.—The law of torts is a division of the common law of England, *i.e.*, the body of rules which have been affirmed by decisions of the courts of common law and their successor, the High Court of Justice. The expression 'common law' is used in various senses in different contexts. We have seen that it originally signified the law laid down by the King's courts for all people and all parts of the country as opposed to local customs administered in the communal and feudal courts

1. See an article by Ames on Law and Morals, *Selected Essays*, p. 1; Bohlen, *Studies in the Law of Torts*, p. 291; C. K. Allen on Legal Morality and the *Jus Abutendi*, 40 L.Q.R. 164. For an instance of the distinction between a religious and legal obligation, see *Bhudeb v. Kalachand*, (1921) 34 C.L.J. 315; 66 I.C. 536 (injunction against the cutting of a sacred *nim* tree refused).

2. Lib. I, Tit. 1, 3. This was taken from Ulpian. See Pollock, *Torts*, p. 2; Sandars, *Institutes of Justinian*, p. 78.

3. As to his influence on the law, see Dicey, *Law and Opinion in England*, Lecture VI.

in different parts of the country. Here it means the case-law or precedents of the common law courts and is distinguished from statute-law or the law enacted by Acts of Parliament.¹ The English law of torts is in the main the case-law of the courts but has also been supplemented by some statutes. As a separate division of substantive law, the law of torts is of modern growth.² Till the middle of the last century the law spoke only of actions in contract and actions in tort. Blackstone, the great expositor of law in the eighteenth century and the author of the Commentaries on the Laws of England, discussed wrongs under the head of their appropriate remedies and not under modern captions like the law of contracts or of torts.³ The recognition of the law of torts as a division of law in England may be said to date from 1860 when the first treatise on the subject was published.⁴ Since then this branch of law has advanced considerably in volume and importance in England and the United States, on account of the great increase in litigation due to the extensive use of mechanical inventions and the expansion of urban and industrial populations in these countries. It is still in the process of expansion to meet the needs of the changing social and economic polity of the modern world. It retains, however, certain anomalous features which are the heritage of its past history. Some instances have been already noticed, *viz.*, the use of the term 'tort' for diverse and dissimilar legal concepts with the result that it is difficult to define or explain it in terms of legal principle,⁵ the inclusion of entirely delictual duties in the sphere of contract under the heads of implied contract and quasi-contract.⁶ Another is the inclusion of absolute liability like that of an employer for the tort of his servant,⁷ or such liability imposed by common law or statute,⁸ though the person held liable has not committed any tort. The reason for these anomalies is, first, that the divisions of law known as the law of torts and the law of contracts comprised rules that had grown round particular forms of action, and second, the twofold distinction between these forms of action into actions in tort and actions in contract tended to become

1. In other contexts it is used in contrast with equity or the case-law of the Court of Chancery, the canon law or the law administered by the ecclesiastical courts, the civil law or the Roman law adopted as the basis of continental systems of law in Europe, the Law Merchant or the Law administered by the old commercial courts of mediæval England, *viz.*, the courts of the Staple and of Fairs and Boroughs and the Court of Admiralty.

2. The law of real property came earliest on account of the special rules that had overlaid it from the days of feudal tenure and was the subject of treatises by great lawyers of the 16th and 17th centuries like Littleton and Coke. The law of contracts by Joseph Chitty appeared in 1826. See an article by Sir F. Pollock on Divisions of Law, 8 Har. L.R. 187.

3. Vol. III, Chap. VIII.

4. Addison, Law of Torts. Francis Hilliard's 'Law of Torts or Private Wrongs' appeared in the previous year in the United States. The late Sir Frederick Pollock's Law of Torts appeared in England in 1886.

5. Above, para. 3.

6. Above, para. 17.

7. Below, Chap. XV & XVI.

8. Below, Chap. XV & XVII.

rigid and prevent the formation of any new or independent category on juristic lines. Sometimes distinctions and classifications whose only claim is their history have the effect of clouding true principle and even the needs of justice. In a recent case¹ Lord Atkin had occasion to speak of the old forms of action and ideas invented to meet their requirements and referred to them in the following picturesque language, "these ghosts of the past standing in the path of justice clanking their mediæval chains." In a later case² Lord Wright said that "these ghosts have been allowed to intrude into the ways of the living and impede vital functions of the law." It should, however, be understood that in spite of occasional lapses due to its history the English law of torts represents a large body of just and sound sense and principle. Besides, during recent years the process of law reform has been more active than before and anomalies and abuses in the law are in the course of elimination by means of legislation as well as judicial decision. The English law of torts has been substantially adopted by the courts in the United States,³ the British Dominions⁴ and India.⁵

21. Law of Torts in the United States.—The English law of torts has been substantially adopted by the courts in the United States except where variations are called for by local conditions⁶. On account of the diversity of decisions in the various states, the American Law Institute, an association of eminent lawyers and professors, has been at work since 1923 on a compilation of Re-statements of this and other branches of law. The first two volumes of the Re-statement of the Law of Torts⁷ were issued in 1934. They form a great contribution to the study of this branch of law and are bound to influence its development in the United States and elsewhere.

22. Roman Law of Delicts.—The term '*delict*'⁸ or '*delictum*' in the Roman Law like the word 'tort' in the English Law meant a private wrong for which the proper remedy was damages or reparation. It, however, differed from tort in two respects. In one respect it was wider as it included theft and robbery which under the Roman Law were exclusively *delicts*,⁹ while they are now regarded as public wrongs or crimes. In another respect it was narrower as it was confined to certain specified wrongs which according to Justinian's Institutes fell under four categories; *viz.*, theft, robbery,

1. (1941) A.C. at p. 29.

2. (1943) A.C. at pp. 63, 64.

3. As to limits of application of the English common law in the U.S.A., see Kinney, *Irrigation*, pp. 311 to 316.

4. On the general question of the law in the Colonies, see Tarring, *Law relating to the Colonies*, Chap. I.

5. Below, paras. 23 & 25.

6. *E.g.*, see below, Chap. VI, para. 24.

7. Prof. Frances H. Bohlen was the Reporter or chief editor of this work.

8. It survives in the French '*délits*', the Italian '*delitti*'; and the Spanish '*delittos*'; Sherman, *Roman Law in the Modern World*, Vol. II, p. 371. As to actions in tort in the ancient Greek cities, see Vinogradoff, *Outlines of Historical Jurisprudence*, Vol. II, p. 191.

9. Justinian's Institutes, Lib. IV, Tit. 1, 2.

damage to a man's property¹ like his slave or animal, and *injuria*² which was here used in the sense of an outrage or affront to a man's person, reputation or family. It excluded wrongs which were known as quasi-delicts,³ which are, however, comprised in the 'tort' of the English law, e.g., personal injury caused by an occupier of a house throwing or pouring something from it, damage to property entrusted to the master of a ship, inn or stable caused by theft by his servants.⁴ Though the term 'quasi-delict' has no counterpart in the English law,⁵ the phrase 'quasi-tort' has been in recent times invented by some writers⁶ and finds a place in some stray decisions.⁷ It has been used to refer to such widely different cases as vicarious liability of employers for injuries caused by their servants,⁸ negligence of a doctor or solicitor for which an action lies in contract or in tort,⁹ an omissive breach of duty like the refusal of a common carrier to convey goods.¹⁰ It appears to be a needless addition to legal terminology and a source of confusion. It is not the only instance of the charm exercised by classical phrases over the legal mind.¹¹ Under the Roman law delict and quasi-delict involved a liability to pay unliquidated damages. The primitive system of private vengeance against the wrong-doer in default of payment of customary amounts of compensation was a feature of the earliest of the Roman codes known as the Twelve Tables.¹² But while this system lingered long in the laws of other countries in Europe, it disappeared and gave place to modern judicial methods at a very early period in Rome.¹³ The assessment of damages, like the decision of other questions of fact in the cause, was originally entrusted to a *judex* or *judices* who were private persons selected to assist the praetor or

1. By the *Lex Aquilia*, Inst. Lib. IV, Tit. 3; Dig. IX.

2. Inst. Lib. IV, Tit. 4; for other instances of *delicts*, see Roby, Roman Private Law, Vol. II, Chap. VI.

3. Inst. Lib. IV, Tit. 5.

4. Another instance in the Roman law was a wrong judgment of a judge due to corrupt motives or even ignorance. In the English law it is not actionable and is excused by judicial privilege.

5. It was adopted by Bracton in his treatise along with other parts of the Roman law, but it did not secure a footing in later treatises or in the courts. It is recognised by the law of Scotland which is based on the civil law and regards wrongs which are also criminal as *delicts*, and wrongs which are not criminal nor breaches of contract as quasi-delicts; Bell, Principles of the Law of Scotland, Ss. 543, 553; *Palmer v. Wick, etc., Shipping Co., Ltd.*, (1894) A.C. 318, 326, *per* Lord Watson who observed that it was often exceedingly difficult to draw the line between '*delicts*' and '*quasi-delicts*'.

6. Ringwood, Outlines of the Law of Torts, p. 6; Salmond, Torts, p. 12.

7. E.g., *Taylor v. Manchester etc., Ry. Co.*, (1895) 1 Q. B. 134, 138, *per* Lindley, L. J.

8. Nathan Issacs in 31 Yale Law Journal, 571-581, referred to by Winfield, Province, p. 210.

9. *Per* Lindley, L. J. in *Taylor v. Manchester, etc., Ry. Co.*, (1895) 1 Q. B. 134; in *Quick v. Thomas*, (1916) 1 K.B. 516, 533, Phillimore, L. J., called the breach of promise of marriage involving a liability to pay exemplary damages as a quasi-tort.

10. Street, Foundations of Legal Liability, Vol. I, p. xxvi.

11. Another instance is *culpa lata* or gross negligence, see below, Chap. XIV, para. 5.

12. B.C. 450-499. Table VIII allowed retaliation for injury to limb in default of payment of compensation, *viz.*, 300 asses for fracture of a bone or tooth of a freeman, 150 asses for that of a slave, 25 asses for other injuries. But homicide was not so emendable and was punishable with the capital sentence.

13. The process of change to the new procedure began when the praetor's office was created in B.C. 367 and was completed by B.C. 89; see History of Roman Law by Pritchard and Nasmyth, pp. 123, 212.

magistrate.¹ But after the reforms during the absolutism of the later empire,² the decision of the whole case by a judge alone became the distinctive feature of the Roman law and of the systems of law based on it in Europe and elsewhere. The Roman law on the subject of delicts as on others had attained its full development by the third century A.D., on account of the exposition of the classical jurists,³ and was codified by Justinian in the sixth century.⁴ The Justinian law was, after a period of obscurity due to the barbarian invasions of the Roman Empire, revived⁵ and adopted under the name, *Corpus Juris Civilis*, in most of the continental countries in Europe like France, Germany and Holland.⁶ It spread from these countries to their distant colonial possessions in other continents. The Code Napoleon which came into force in France early in the last century⁷ was based on the civil law and has since been borrowed and adopted in many countries in Europe and elsewhere.⁸ The civil law was also adopted as the private law of Scotland.⁹ To this extensive reception of the Roman law, England remained an exception. Her common law was indigenous in its structure and the result of a slow evolution of the precedents of her courts. Thus it happens that the English law of torts though greatly influenced from time to time by the rules and terminology of the Roman law¹⁰ has been developed on independent lines and is not an organic importation of the Roman law of delicts.

23. Law of Torts in India.—In India the English law of torts has been substantially adopted since the advent of the British courts. The English law, civil and criminal, is considered to have been introduced into India in 1726 by a Parliamentary Charter which established the Mayor's Courts in the three cities of Calcutta, Madras and Bombay.¹¹ Before passing on to the extent of the application of the English law, it may be interesting to look back on the law of torts in India prior to the British occupation.

1. This system was known as the 'formular system' as the praetor submitted a 'formula' or instructions to the judex. The formula included the *condemnatio* or the authority to condemn, i.e., award damages against the defendant. For a description of this system, see Pritchard and Nasmith, History of the Roman Law, p. 551; Sherman, Roman Law in the Modern World, Vol. II, p. 401.

2. The reform was made by Diocletian in A.D. 294. The later empire began from his reign (A.D. 284).

3. Their period is said to be from A.D. 98 to 244.

4. Code (A. D. 529), Digests or Pandects (A. D. 533), Institutes (A. D. 533), and Novels (A.D. 535-565).

5. In the 12th century there was a great revival of the study of Roman law in Europe, e.g., in the school at Bologna.

6. On this subject, see Sherman, Vol. I, Part II, Chap. III; Holdsworth, Vol. IV, p. 217, etc.

7. In 1804; the edition now in force is that of 1816. For some features of the French law of delicts, see F. P. Walton, 49 L.Q.R. 70.

8. In Greece, Italy, etc., in Europe; Central and South America, the State of Louisiana in the United States, the province of Quebec in Canada, and Japan, Sherman, Vol. I, pp. 247, 248; Bryce, Studies in History and Jurisprudence, Vol. I, pp. 84-94.

9. Sherman, Vol. I, p. 342.

10. As to Roman influence on the English law, see P. & M. Vol. I, p. 135; Vol. II, p. 559; Holdsworth, Vol. IV, pp. 285-293.

11. *A.G. of Bengal v. Ranee Surnamoye Dossee*, (1865) 9 M.L.A. 387, per Lord Kingsdown; *Mayor of Lyons v. E.I. Co.*, (1836) 1 M.L.A. 175 is usually regarded as the authority for this statement. As to these cases, see Pollock, Fraud, pp. 1-11.

24. Hindu and Muhammadan law of Torts.—(a) The Hindu Law had from the earliest times a law of torts or private wrongs.¹ Its chief sources are first, the *smritis* of which the Code of Manu is the most ancient, and that of Yajnavalkya² with its commentaries the most authoritative in the courts, and other later *smritis*³ like those of Narada, Vyasa, Brihaspati and Katyayana which are regarded as supplementary authorities; and secondly, the commentaries or digests of the *smritis* by various glossators. The Code of Manu which is assigned by scholars to a period varying from the beginning of the Christian era to ten centuries before it⁴ furnishes a remarkable contrast to the contemporary laws prevalent in Europe and to Sir Henry Maine's well-known description of them.⁵ It does not countenance any right to retaliation or extra-judicial redress⁶ or any system of private composition of crimes by payment of fixed sums of damages. On the contrary its law of crimes is fuller and more prominent than its law of compensation for injuries,⁷ and it prescribes punishments for wrongs which would now be regarded as wholly civil causes of action, *e.g.*, non-payment of debt, breaches of contract.⁸ Its public law proves beyond doubt that the community had long passed its stage of infancy and had attained a highly developed social organisation in which the control of the State or the King over individual conduct was complete and rigorous.⁹ Its civil or private law furnishes similar evidence of a high degree of juristic development. Its scheme of civil and criminal law is discussed under eighteen heads,¹⁰ *e.g.*, gifts, sales, partition, bailments, non-payment of debt, breaches of contract, disputes between partners, assault, defamation, theft, robbery. In this scheme of justice the rules regarding compensation for injuries are comparatively unimportant and are only mentioned incidentally under some of the above titles. The right to recover compensation is recognised in three cases, *e.g.*, damage to crops by trespass of cattle,¹¹ bodily injury resulting in medical and other expenses for cure,¹² damage intentional or otherwise to goods.¹³ The decision of disputes including that relating to compensation was made by the judge who might be the King himself or his delegate,¹⁴ on evidence of witnesses.¹⁵ When we pass on to the later *smritis* we find that though they usually adopt Manu's divisions of law, they have a larger number of rules on this subject, required by the circumstances of a later age. If we take up one of their latest commentaries or digests, like the Viramitrodaya,¹⁶ we find that these rules have been by the process of gloss and interpretation expanded in detail and supplied with

1. As to its chronology see Mayne, Hindu Law, S. 21.

2. 2nd or 3rd century A.D.; Mayne, S. 16. The Mitakshara is the well-known and authoritative commentary. In Bengal and in Bombay the commentaries in force are respectively, the Dayabhaga and the Vyavahara Mayukha.

3. From 5th to 9th century A.D., see Mayne, S. 17; Sacred Books of the East, Vol. XXV, Introduction, pp. cx, cxviii.

4. Mayne, Hindu Law, S. 15; Sacred Books of the East, Vol. XXV, p. cxvii.

5. Above, para. 5.

6. The right of a creditor to take back his property or money is an exception Chap. VIII, Ss. 48-50.

7. Priyanath Sen, Hindu Jurisprudence, p. 336.

8. This was also a feature of the English courts when they were first established, above, para. 5; for instances of punishments for these causes of action, see Holdsworth, Vol. II, p. 383.

9. Besides judicial punishment there was also a scheme of expiation for special cases, *e.g.*, theft, adultery.

10. Chap. VIII, Ss. 4-7.

11. Chap. VIII, 241.

12. VIII, 287.

13. VIII, 288.

14. VIII, 9, 10.

15. VIII, 45, 178.

16. By Mitra Misra of the 17th century. The authority of his work in North and South India is judicially recognised. The Vyavahara Mayukha is a similar authority in Western India and has similar rules.

technical phraseology. They are not very dissimilar to the subject-matter of the modern law of torts and relate to such topics as injuries to person and property,¹ cattle-trespass, waste by lessees,² fraud of vendors,³ negligence or fraud of carriers or of bailees⁴ under different kinds of bailments, measure of damages⁵ and defences⁶ in different cases. Between the Hindu law and the English law of torts, there is one broad and important point of difference, *viz.*, that the Hindu law recognises a right to compensation only when there is pecuniary loss and not in other cases like assault, false imprisonment, defamation, insult, adultery, etc., which are only punishable and not actionable wrongs. The tort of the Hindu law is thus a much more narrow and restricted legal conception than the tort of the English law or the delict of the Roman law. (b) The Muhammadan law went even further in the direction of subordinating the tort to the crime. It regarded serious acts of violence to the person as punishable and not as actionable wrongs. It had, however, rules about compensation in other cases like usurpation of property.⁷

25. Extent of adoption of the English law of torts in India.—

After the establishment of British courts in India they were enjoined by statute to follow the personal law of the parties, Hindu law in the case of Hindus and Muhammadan law in the case of Muhammadans, only in certain matters like inheritance, succession, marriage and religious usages.⁸ In other matters where there was no specific legislative provision they were required to administer justice, equity and good conscience.⁹ In cases of torts they have adopted the English common law, as it is generally consonant to justice, equity and good conscience.¹⁰ They have departed from it when any particular rule appeared unreasonable or unsuitable to local conditions, *e.g.*, the rule denying an action for slander when there was no proof of pecuniary damage,¹¹ the doctrine of common employment.¹² While this is settled to be the proper procedure for the courts in the Provinces and the High Courts in their appellate jurisdiction, the view was long entertained by some authorities that in cases arising within

1. Calcutta Edition, p. 476. 2. p. 469. 3. p. 341. 4. p. 364.

5. p. 364; *e.g.*, damages differ according as the loss was due to the bailee's neglect or accident. 6. *E.g.*, act of God, act of the King.

7. Abdur Rahim, Muhammadan Jurisprudence, p. 369.

8. The earliest enactments were (1781) 21 Geo. III, c. 70, s. 17; (1797) 37 Geo. III, c. 142, s. 13. These words are repeated in later Indian Acts establishing civil courts in different provinces. On this subject see Iibert, Govt. of India, pp. 56, 249-251.

9. *E.g.*, Madras Civil Courts Act, 1873, s. 16 (c).

10. *Waghela Rajsanji v. Sheikh Mashedin*, (1887) L.R. 14 I.A. 89; 1 L.R. 11 Bom. 551, 561 (P.C.); *Satish Chandra v. Ram Dayal*, (1920) I.L.R. 48 Cal. 388, 408; 24 C.W.N. 982; *Tiruvengada v. Tripurasundari*, (1926) I.L.R. 49 Mad. 728, 736; 51 M.L.J. 112; *Baboo Thakur v. V. Subanshi*, I.L.R. 1942 Nag. 650; 1942 Nag. 99; cf. *Srinath Roy v. Dinabandhu*, (1914) I.L.R. 42 Cal. 489 P.C. (law of waters).

11. *Parvathi v. Mannar*, (1884) I.L.R. 8 Mad. 175; *Dawan Singh v. Mahip*, (1888) 1 L.R. 10 All. 425; below, Chap. VII, para. 5; as to the rule of merger of tort in felony, below, Chap. XIX, para. 40.

12. *Secretary of State for India v. Rukhmini Bai*, I.L.R. 1938 Nag. 54; 1937 Nag. 354; below, Chap. XVI, para. 20. Also the rule in *Merryweather v. Nixan*; *Khushalrao v. Bapurao*, I.L.R. 1942 Nag. 1; 1942 Nag. 52.

the limits of the three cities, Calcutta, Madras and Bombay, the High Courts were bound by the old Charters to follow the common law as it prevailed in England in 1726 and were not competent to depart from any of its rules. The Calcutta High Court¹ accepted this view. But the Bombay² and Madras³ High Courts have held that this view is really not warranted by the language of the Charters, and that in cases arising in these cities they are bound to administer the English common law only so far as circumstances permit and according to "justice and right." This view in effect reduces considerably the chances of diversity between the law of these cities and that of the rest of the country. Unlike other branches of the law like contracts, property, trusts, etc., the law of torts has not yet been codified in India.⁴

26. Division of the subject.—We now proceed in the following chapters to deal with the subject under four heads: (i) Different kinds of torts; (ii) Principles of liability; (iii) General defences; (iv) Remedies.

27. Principle underlying different kinds of torts.—The different kinds of torts discussed in the following chapters are violations of various rights of the individual for which the law allows actions for damages. Some of the most important of these rights are in respect of the security of his person, his domestic relations, his property and reputation. With the advance of civilisation and commerce other rights have secured recognition, *e.g.*, the right to be protected from pecuniary loss caused by perversion of judicial machinery, fraud, interference with contractual relations, trade, business and employment, infringement of patent right, copyright and trade-mark. The law affords redress also for the violation of some rights which have no pecuniary value but are highly prized, *e.g.*, the right to vote, the right to worship, the right to the status of a member of a caste in India. On the other hand the law does not recognise or afford redress for some rights which may be highly prized, *e.g.*, a right to emotional tranquillity or to freedom from mental pain or distress, a right to privacy or to freedom from unauthorised publication of one's personal or private affairs. But as the learned compilers of the American Re-statement observe, "the entire history of the development of Tort law shows a continuous tendency to recognise as worthy of legal protection interests which previously were not protected at all." The general principle in all these

1 *Bhooni Money v. Natobai*, (1901) I.L.R. 28 Cal 452; 5 C.W.N. 659; *Sukban v. Bipad*, (1906) I.L.R. 34 Cal. 48.

2 *Hirabai v. Edulji*, (1926) I.L.R. 51 Bom. 167; 28 Bom. L.R. 134.

3 *Narayan Sah v. Kannamma*, (1931) I.L.R. 55 Mad. 727; 62 M.L.J. 608; see an article on this case by the present writer in the Madras Law College Magazine, February, 1930, p. 13; below, Chap. VII, para 5.

4 In 1886 Sir F. Pollock prepared a Bill known as "The Indian Civil Wrongs Bill" at the instance of the Government of India; Pollock, Torts, (13th ed.), p. 622. But it was not taken up for legislation. On this subject, see 5 L.Q.R. 362. 5. Vol. I, p. 3.

cases is that if there is a legal right, there is a remedy for its violation. The remedy is available though the *injury* does not cause actual or pecuniary damage. If the plaintiff cannot show a violation of any legal right of his, he cannot succeed merely on the ground of damage.¹ These principles are usually expressed by saying that *injuria sine damno* is actionable, but *damnum sine* (or *absque*) *injuria* is not.² An instance of the former rule is *Ashby v. White*; ³ and of the latter, the old case of the *Gloucester Schoolmaster* ⁴ where it was held that the plaintiff, a schoolmaster, had no right to complain of the opening of a new school resulting in the loss of his pupils and the damage suffered thereby was *damnum absque injuria*. As the concepts of right and duty are correlative, the plaintiff in an action in tort must, in order to succeed, establish a violation of some legal right of his, or of some legal duty of the defendant towards him.

1. *Rogers v. Rajendro Dutt*, (1860) 8 M.L.A. 101, 131; 2 W.R. 51 (P.C.).

2. The phrases were first used by Bracton by way of analysing the wrong of nuisance; below, Chap. VI, para. 2.

3. (1702) 2 Ld. Raym. 938; above, para. 12. See also *Kali Kischen v. Jodolal*, (1879) L.R. 6 I.A. 196, 190; 5 C.L.R. 97; *Nicholls v. Ely Beet Sugar Factory, Ltd.*, (1936) Ch 343, 350, 351, *per* Lord Wright.

4. (1411) Y.B. 11 Hen. IV, 47 pl. 21; Kenny, Cases on Torts, p. 174.

CHAPTER II.

INJURIES TO THE PERSON.

1. **Injuries to the person.**—The security of the human person comes first in importance among civil rights and has been the primary concern of law from its infancy. The law of crimes prescribes for the violation of this right various punishments according to the guilt of the wrongdoer. The law of torts is concerned with the award of damages to the aggrieved. An action for damages lies for the following injuries: (a) bodily harm, (b) battery, (c) assault, (d) false imprisonment. Under the common law of England, the most serious of personal injuries, *viz.*, homicide, is not an actionable wrong. The law has, however, been altered by statute in that respect.

2. **Bodily harm.**—Bodily harm is used here in the sense in which hurt is defined in the Indian Penal Code¹ and means bodily pain, disease or infirmity. In an action for damages for bodily harm, the plaintiff must prove that the defendant is liable in one of the following modes: (i) by causing it intentionally; (ii) by causing it negligently; (iii) by any principle of absolute liability under the common law or statute;² an instance of the former is the rule in *Rylands v. Fletcher*,³ and of the latter is the Workmen's Compensation Act⁴; (iv) by the rule of vicarious liability if bodily harm was caused by the defendant's servants or agents acting in the course of their employment; (v) by the breach of a statutory duty.

Bodily harm as the title of a division of personal injuries is new. The older practice was to deal with it under two separate heads, (a) actions for trespass by assault, battery and false imprisonment, and (b) actions for negligence. This arrangement was appropriate to the older procedure of forms of action, but could have no claim to be logical and was plainly defective, because the two groups were neither exhaustive nor demarcated by any principle. Thus there may be intentional bodily harm which is not a battery, *e.g.*, a chemist wilfully supplying a poisonous drug to a patient with intent to injure him; and a battery which in the older law included wounding and was not confined to an intentional touching of another's person as it is now, may be negligent. The arrangement is also inconsistent with any rational classification of torts, because while many of them which have acquired distinct names like assault, battery, libel, trespass, nuisance, etc., could be regarded as violations of different legal rights and classified in that way, a separate category of negligent violations of these rights would cut across such a classification. In spite of these defects, the old

1. S. 319.

2. Below, Chap. XV.

3. (1866) L.R. 1 Ex. 265; (1868) L.R. 3 H.L. 330. Below, Chap. VI, para. 64.

4. Below, para. 8.

arrangement has been continued in modern text-books of repute as a matter of convenience. We must remember that though forms of action are no more, they have left permanent marks on the law. The rules which have grown round specific torts differ from those governing the actions on the case for negligence. Thus an action for the tort of trespass to person or property or nuisance differs in the mode of proof of the plaintiff's case from an action for an injury to person or property due to negligence and not falling within the scope of one of the above nominate torts.¹ It has been therefore the practice to retain the old divisions and deal with the rules appropriate to them. The late Sir John Salmond² made an attempt at a logical classification of torts by regarding them as violations of different kinds of rights and negligence as a mode of liability for them. In such a classification bodily harm would include personal injuries due to negligence as well as other kinds of misconduct or breach of duty.³ This arrangement is adopted here. Apart from the obvious advantages of attempting to reduce legal principles to an orderly system, it has a distinct value in the present context, as it draws attention to an important principle of liability for bodily harm to be presently explained.

3. Liability for bodily harm.—The statement that an action for bodily harm will lie if it is caused by a breach of duty in one of the modes set forth above necessarily involves its corollary, *viz.*, that bodily harm caused otherwise is not actionable. In the absence of special modes of liability the normal rule is that the plaintiff in an action for bodily harm must prove intention or negligence on the part of the defendant and cannot recover for harm due to inevitable accident. This rule may appear to us as simple and inevitable but emerged into clear view and was formally recognised only in modern times. It was obscured by the older procedure which drew a line between trespass and case by inventing a distinction between direct and indirect injuries. This distinction did not take note of any rule of liability in the modern sense, as both direct and indirect injuries may be caused by negligence or accident. The theory was often put forward by early authorities⁴ that trespass lay for a direct injury even if it was an inevitable accident, in other words liability in trespass was

1. Therefore negligence also has been called 'a specific' or 'independent tort', below, Chap. XIV, para. 7.

2. *Torts*, (7th ed.), *s.g.*, Chap. XI, pp. 428, 435. Dr. Stallybrass, the learned editor of the 8th and 9th editions has adopted the older arrangement.

3. This was recognised even by the older law for particular purposes. "The category of 'personal' wrongs included torts of negligence causing personal injuries", per Lord Wright in *Rose v. Ford*, (1937) A.C. 826 at p. 841.

4. *Weaver v. Ward*, (1616) Hob. 134; Pollock, *Torts*, p. 108; Holdsworth, Vol. VIII, p. 453; Wigmore, *Anglo-American Essays on Legal History*, Vol. III, p. 474.

absolute.¹ It was only in a case decided in 1871, *Holmes v. Mather*;² that this theory was definitely rejected in England. In that case the plaintiff was knocked down by the horses in the defendant's carriage which having been startled by a dog rushing and barking at them got out of control in spite of the efforts of the driver. It was held that there was no negligence on the part of the defendant or his driver and even if the action were in trespass it could not succeed without proof of intent or negligence. To the same effect was the decision in *Stanley v. Powell*³ where the plaintiff who was one of a shooting party was accidentally hit by a bullet shot from the defendant's gun glancing off from the bough of a tree, and the defendant was held not liable as his negligence was not made out. We will see later that the law of trespass to land has not similarly shaken off the older doctrine and preserves traces of it at the present day.⁴

The rules relating to liability and causation will be discussed later with reference to torts in general. Two types of bodily harm which illustrate causation may be noticed here, *viz.*, first, nervous shock and illness caused without physical impact, and second, injury sustained by a child while in the mother's womb. It would also be convenient to notice here the special rules of liability and compensation for bodily harm introduced by statute in certain cases.

4. Nervous shock.—It is now settled in England that an action lies for damages for illness due to nervous shock caused without physical impact or lesion, *e.g.*, by means of words or acts causing fright.⁵ But no action lies for a nervous shock without appreciable bodily illness supervening on it, or for mental pain or sorrow or other injury to feelings or emotions.⁶ Where however, there is an independent cause of action, *e.g.*, assault or defamation, a plaintiff may claim compensation also for injuries to his feelings. In other words, emotional disturbance is not by itself a cause of action but redress for it is 'parasitic' on a cause

1. The writ of trespass was originally intended as a remedy for cases of intentional violence and a substitute for the older remedy of appeal (above, Chap. I, para. 11). In such cases the usual plea of the defendant would be 'not guilty', *i.e.*, a denial of the trespass. Once he was found guilty of the trespass, his responsibility for its consequences would usually be manifest and he hardly open to the plea of inevitable accident. The extension of the writ on account of its popularity to cases of lawful acts and their injurious consequences (*e.g.*, a running-down accident) probably accounts for the theory.

2. L. R. 10 Ex. 261, at pp. 263, 269, per Bramwell, B.

3. (1891) 1 Q.B. 36; as to this case, see Beven, Negligence, I, p. 710.

4. Below, Chap. IV, para. 19.

5. *Coyle v. Watson*, (1915) A.C. 1, 13; *Hay v. Young*, (1943) A.C. 92.

6. *Lynch v. Knight*, (1861) 9 H.L.C. 577, 598; see also *Dulieu v. White*, (1901) 1 K.B. at p. 673; *Dipchand v. Manakchand*, I.L.R. 1939 Nag. 429; 1939 Nag. 154. In some American States damages have been allowed for mental anguish due to negligence of a telegraph company in delivering a mistaken message regarding a death or a funeral; *Cooley*, Torts I, p. 90.

of action for the violation of some other right recognised by the law.¹ The present rule allowing actions for nervous shock and resulting bodily harm is in variance with that laid down fifty years ago in *Victorian Railway Commissioners v. Coullas*². In that case the Privy Council held that damage arising from mere sudden terror unaccompanied by physical injury, but occasioning a nervous or mental shock, should be regarded as too remote, because it was difficult to decide whether such damage was caused by another's negligence, and if such a claim were allowed, a wide door would be opened for imaginary claims. The decision was apparently influenced by the danger of trusting expert witnesses to prove such claims or juries to decide them. In an American case³ a learned judge drew attention to the notorious partiality of expert witnesses and of juries in such cases, as the plaintiffs usually are of the fair sex, and the defendants rich corporations like railway companies.⁴ The above decision was probably also due to the fact that the connection between mental or nervous disturbances and the physical system was not so clearly perceived formerly as it is now with the advance of medical science.⁵ Here we have an interesting instance of the rule as to causal relation being influenced by prevalent policies and beliefs.⁶ The decision however, has been repeatedly dissented from and is no longer law.⁷ The question of liability for nervous shock may arise in different types of cases and is more simple in some than in others.

5. Nervous shock resulting from wilful wrong-doing.—When a person by acts or words causes fright or alarm to another with intent to cause bodily illness or knowing that he is likely to cause it, he is of course liable for the resulting harm. In *Wilkinson v. Downton*⁸ where the defendant out of mischief frightened the plaintiff with false news that her husband had met with a serious accident and was lying in hospital, he was held liable for the illness which the plaintiff suffered from as a consequence. Similarly in *Janvier v. Sweeney*,⁹ the plaintiff recovered damages from two private detectives who during the last war went to her

1. 49 Har. L. R. at p. 1048

2. (1888) L. R. 13 A. C. 223, an appeal from Australia. The plaintiff complained of shock and illness due to fear of being killed by a passing train which dashed past her in a level-crossing kept open by the negligence of the defendants' gate-keeper, while she and her husband were driving across in a buggy, held damage too remote.

3. *Wright v. Southern Express Co.*, (1897) 80 Fed. 85; Wigmore, Select Cases on Torts, I, p. 52; for other American instances of such claims, see Wigmore I, p. 57 etc.; Cooley, Torts, Vol. I, p. 67.

4. Holdsworth, I, p. 347; "It is said that juries are always biased when a pretty woman or a railway company happen to be litigants." In *The Nigel*, (1912) P. 99, and *Howard v. Furness Houlder, Ltd.*, (1936) 2 A. E. R. 781, the persons shocked were men.

5. *Hambrook v. Stokes*, (1925) 1 K. B. at p. 154 *per* Atkin, L.J.

6. Below, Chap. XIV, para. 66.

7. Above, p. 37 note 5.

8. (1897) 2 Q. B. 507.

9. (1919) 2 K.B. 316.

and threatened her with a false charge that she was corresponding with a German spy. In these cases, the damage resulted from words spoken to the plaintiff. In *Allsop v. Allsop*,¹ it was held long ago that where the defendant spoke slanderous words about the plaintiff to another, the plaintiff could not complain of her illness as a natural consequence of the slander. It may be difficult in many cases to regard the illness as the result of the slander rather than of other predisposing causes in the person concerned but it cannot be a hard and fast rule that in no case can such consequences result from slander. If, for instance, the slanderer had reason to know that such would be the result, there is no reason why he should not be held liable.

6. Nervous shock due to negligence.—The cases of nervous shock and illness caused unintentionally are more difficult. In such cases it is essential to keep clear the two requirements in an action for negligence, *viz.*, breach of duty and causal relation. When the defendant negligently causes danger of bodily injury to the plaintiff by physical impact he may also be considered under a duty to have foreseen that his conduct, even if it does not actually cause the impact, might cause serious fright and alarm and bodily harm thereby. In *Dulieu v. White*,² the defendant's servants negligently drove a van and horse into the plaintiff's house and the plaintiff recovered damages for the resulting fright and illness. A more difficult case is where the defendant negligently causes injury or danger of injury to *A*, and *B* on seeing it or hearing of it, gets a shock and illness. In such a case the question is not merely one of causation. The defendant can be held liable only if a breach of duty towards *B* and not merely to *A* can be made out. This would depend on the facts. Nervous shock and illness due to seeing a person injured or killed in a road accident may ordinarily be ascribed to the hyper-sensitiveness of the person shocked, and would then not be within the reasonable contemplation of the actor, but in particular cases it may be otherwise. In *Hambrook v. Stokes*,³ the defendants' servant negligently left a motor lorry unattended in a steep and narrow street with the result that it ran down the street, and a woman who was walking there became frightened for the safety of her children whom she had just then left farther down in that street. She sustained a severe shock and illness of which she died. In an action by her husband under the Fatal Accidents Act for loss of her service, the defendants admitted negligence but pleaded that the damage

1. (1804) 5 H. & N. 534; below, Chap. VII, para. 86.

2. (1901) 2 K. B. 669; see also *Bell v. G. N. Ry. Co.*, (1890) 25 L. R. Ir. 428 (shock caused to a passenger by negligent driving and sudden stopping of a train).

3. (1925) 1 K. B. 141. For a criticism of this decision, see 41 L. Q. R. pp. 132, 297; 51 L. Q. R. pp. 641-642. Cf. *Brandon v. Osborne, Garrett & Co.*, (1924) 1 K. B. 543; see however Restatement, § 313. In *Hay v. Young*, (1943) A. C. 92, opinion on this decision was divided, Lords Thankerton, Russell and Macmillan against, or doubting and Lords Wright and Porter for it. Cf. the Australian case noted in 55 L. Q. R. 495.

was too remote a consequence. The action was allowed by the Court of Appeal (Bankes and Atkin L. J. J., Sargant L. J. diss.) who held that the negligence of the defendants' servant in leaving the lorry in a position of danger amounted to a breach of duty to the mother, because fear of injury happening to her children might cause a shock to her. This conclusion about breach of duty was held to follow also from the defendants' admission of negligence in the pleadings but even apart from this, it does not appear unreasonable to hold a person liable to the mother if he by his negligence causes fear of her children being run over by a lorry and seriously injured or killed in her presence or proximity. If this view is right the further question of causal relation is comparatively simple because the damage complained of resulted directly and in natural sequence from the breach of duty to her. While Bankes and Atkin, L. J. J. disagreed with the dictum of Kennedy, L. J. in *Dulieu v. White* that a duty can arise only towards a person suffering from a shock resulting from fear of personal injury to himself and not to others, Bankes, L. J., thought that a duty could arise towards the mother of the person actually injured or in danger or persons in a similar relation, but Atkin, L. J., as he then was, considered that it was difficult so to limit the duty and it may be owed even to any bystander. It is submitted with respect that it is preferable to treat the question of reasonable anticipation as one of fact instead of crystallising it into rigid rules which may prove unsuitable for actual situations. Far more controversial and doubtful is a recent decision of the Court of Appeal in *Owens v. Liverpool Corporation*.¹ Here the plaintiffs complained of ill-health due to mental shock on seeing the coffin of a near relative being overturned by a collision of the horse with a tram car negligently driven by the defendants' servant. It was held that liability for causing shock is not confined to cases of personal injury to the claimant or some other person. In *Hay v. Young*,² the latest case of the House of Lords on the subject, this decision has been disapproved and it was pointed out that the Court of Appeal was not justified in thinking that the driver should have anticipated any injury to the plaintiffs as mere spectators or that he was in breach of any duty which he owed to them.³ The absence of duty was forcibly illustrated in the House of Lords case. The plaintiff complained that she sustained nervous shock resulting afterwards in miscarriage and serious illness by hearing of the noise of a collision between a motor cyclist and a motor car. The cyclist was driving negligently and was killed. She did not see the collision but was on the far side of a stationary tramcar from the platform of which she, a fishwife, was unloading her basket. She admitted that she had no fear of bodily harm to herself. She sued the executor of the deceased cyclist on the ground that his negligence was the

1. (1939) 1 K.B. 394.

2. (1943) A.C. 92.

3. (1943) A.C. at p. 160, per Lord Thankerton.

cause of her injury. The House of Lords held that the cyclist did not commit a breach of any duty towards the plaintiff though he was guilty of a breach of duty to persons within the sphere of danger. "The shock resulting to the appellant, situated as she was, was not within the area of potential danger which the cyclist should reasonably have in view."¹

7. **Injury to a child in the womb.**—In *Walker v. G. N. Ry. Co. of Ireland*² the plaintiff, a child, sued a railway company for damages on the ground that the plaintiff's mother while pregnant travelled by the defendants' railway and was injured by their negligence and on account of those injuries the plaintiff was born deformed and crippled. It was held that the plaintiff had no right to complain of such injuries. The decision proceeded on grounds similar to those in *Victorian Railway Commissioners v. Coultas*,³ viz., the difficulty of proving that the damage was due to the alleged negligence, and the danger in allowing such evidence. It was also suggested that the defendants undertook the duty of safe carriage only to the mother but not to the child in her womb. Both the cases are open to the same criticism.

8. **Workmen's Compensation Acts in England⁴ and in India.⁵**—These Acts⁶ provide that if in the case of certain specified employments, "personal injury is caused to a workman by accident arising out of and in the course of his employment", his employer is liable to pay compensation according to scales detailed in the Acts.⁷ The liability of the employer is in the nature of insurance of his workman against the risks inseparable from the employment.⁸ It is independent of intention or negligence and is in fact one of the most absolute forms of liability in the law. The only exception allowed by the Indian Act is in the case of an injury not resulting in death and caused by an accident which is directly attributable to certain forms of wilful misconduct or neglect defined therein.⁹ Therefore, mere carelessness or contributory negligence which would defeat an action for damages for negligence is no defence.¹⁰ So also the acts of

1. (1943) A.C. at p. 99, per Lord Thankerton.

2. (1891) 28 L.R. Ir. 69.

3. (1888) 13 A.C. 322.

4. The principal Act is of 1925, 15 & 16 Geo. 5, c. 84, above, Chap. I, para. 14; below, Chap. XVI, para. 26.

5. Act VIII of 1923 amended by Act XV of 1933 and I of 1942.

6. S. 1 of the English and S. 3 of the Indian Act.

7. Subject to certain maxima, e.g., Rs. 5,600 for total disablement.

8. Below, Chap. XV, paras. 1, 3, 4.

9. In the English Act the words are more general, viz., "serious and wilful misconduct", and both cases of death and serious and permanent disablement are excluded from the defence.

10. *Andrew v. Fairsforth Industrial Society*, (1904) 2 K.R. 32 (a bricklayer killed by lightning while working in an exposed scaffolding); *Morgan v. Owners of S. S. Zanada*, (1909) 25 T.L.R. 446 (a seaman killed similarly); *Harris v. Assd. Portland Cement Manufacturers Ltd.*, (1939) A.C. 71.

God or of the King's enemies¹ or of a third party² are no defences if the injury could be said to arise out of and in the course of the employment. The phrase 'personal injury' caused by *accident* would include even wilful acts of third parties, *e.g.*, an assault or murder,³ subject to the test aforesaid. The liability under the Act cannot be excluded or reduced by contract. The workman has to elect between the remedy under the Act and an action for damages and if he adopts one of them, he is barred from having the other. Disputes arising under the Act have to be settled not by the ordinary Civil Courts but by a Commissioner appointed by the Local Government and in accordance with the procedure prescribed by the Act. The detailed rules on the above and other matters set forth in the Act and the large mass of case-law with which they have been overlaid in the English courts have assumed the dimensions of a separate branch of the law. That these rules have been and continue to be a most fertile source of litigation in England proves that legislation is not always the simple expedient for achieving certainty that it is generally considered to be, especially in cases where it seeks to give effect to social policies which affect large and conflicting interests.⁴ In India the Act has not given rise to much litigation probably because of the comparative paucity of industrial employments here.

9. Legislation relating to aircraft.—In view of the great development of aviation in recent times there has been legislation for the purpose of regulating the use of aircraft and providing special rules of liability and compensation for accidents. After the last war, these matters were the subject of international conventions⁵ and legislation in England and India gave effect to them so that there might be uniformity in the rules applicable to aviation in different countries. This legislation falls under two heads: (i) the Air Navigation Acts dealing with injuries to person or property outside an aircraft, (ii) the Carriage by Air Acts dealing with injuries to a passenger in an aircraft and his property in it.

10. The Air Navigation Acts, 1920 and 1936.—In England, under the Act of 1920,⁶ the owner of aircraft is absolutely liable for material damage or loss caused by his aircraft in flight, taking off, or landing, or by any person in any such aircraft or by any article falling

1. *Bird v. Keep*, (1918) 2 K.B. 692 (workman killed by a bomb thrown in an air raid).

2. *Trim Joint Dt. School v. Kelly*, (1914) A.C. 667 (schoolmaster killed by some of his boys); *Powell v. G.W.Ry. Co.*, (1940) 1 A E.R. 87 C.A. (a fireman in a railway engine hit by a pellet from an airgun deliberately aimed by a boy of 19 years of age).

3. See note 4.

4. On this subject and the actual results of the legislation, see W.A. Robson, 51 L.Q.R. pp. 197, 198.

5. 10 & 11 Geo. 5, c. 80; 26 Geo. 5 & 1 Ed. 8 c. 44. The former gave effect to the Paris Convention of 1919 relating to Aerial Navigation; the latter to the Rome Convention of 1933.

6. S. 9.

from such aircraft, to any person ¹ or property on land or water. It is not merely unnecessary for the plaintiff to prove intention or negligence but the defendant cannot escape by disproving these facts. The only defence available to the owner is contributory negligence of the person complaining of the damage. The above Act does not apply unless extended by an Order in Council, to aircraft belonging to or exclusively employed in the service of the Crown. Under the Air Navigation Act, 1936,² the total liability of the owner or his estate for damage caused on any one occasion as aforesaid under the Act of 1920 is limited to varying amounts according to the description and weight of the aircraft ³. The liability of the owner of aircraft under the Act of 1920 proceeds on the principle that flight of aircraft is an ultra-hazardous operation against the consequences of which he should insure others. It would not fall within the rule of *Rylands v. Fletcher*,⁴ which applies only to things escaping from one's land, but is more stringent as it does not admit of the exceptions to that rule. It could not, in view of the rapidity with which the problems of aviation overtook the law, be well left to be evolved by courts and was therefore enacted by statute in England. Legislation during the present war has made provision for compensation payable by the State for damage to person and property caused by enemy aircraft or operations of allied aircraft in combating enemy action.⁵ The Indian Aircraft Act of 1934⁶ makes it a punishable offence for any person wilfully to fly an aircraft in such a manner as to cause danger to any person or property on land or water or in the air but does not contain any special rule of civil liability similar to that in the Air Navigation Acts in England. Therefore it would appear that the ordinary law will apply in cases of damage to person or property by flight of aircraft in India.

11. The Carriage by Air Acts in England ⁷ and in India ⁸.—By these Acts which gave effect to the International Convention of Warsaw, 1929, a carrier of an "international air-carriage,"⁹ e.g., a carriage between two states signatory to the convention, is made liable for death or bodily harm of a passenger due to an accident which took place on board the aircraft or in the course of any of the operations of embarking or

1. Loss to person includes bodily harm and death; A.N. Act of 1936, s. 34 (3).

2. Under the Pilotage Authorities (Limitation of Liability) Act, 1936, the liability of a pilotage authority for damage to any vessel or vessels is limited to certain amounts. See also Air Navigation (Financial Provisions) Act, 1938, 1 & 2 Geo. 6, c. 33.

3. E.g., £ 10,000 for personal injury if the weight of the aircraft fully loaded does not exceed 5,000 pounds. 4. Below, Chap. VI.

5. Personal Injuries Act, 1939, below, para. 12 (a); War Damage Act, 1943, 6 & 7 Geo. 6 c. 221. 6. Act XXI of 1934, s. 11.

7. 1932, 22 & 23 Geo. 5, c. 36.

8. Act XX of 1934.

9. It is defined by Sch. 1, Chap. 1, Art. 2; see *Grain v. Imperial Airways*, (1937) 1 K. B. 50; *Philpott v. Imperial Airways*, (1938) 1 A.E.R. 759.

disembarking.¹ The plaintiff in the action need not, as in an ordinary action for negligence prove negligence and it is on the air-carrier to disprove it by showing that he and his agents had taken all necessary measures and the injury was due to an inevitable accident. The carrier can also exonerate himself wholly or partly from liability by proving contributory negligence of the injured person. The liability of the carrier for each passenger is limited to the sum of 1,25,000 francs or their equivalent at the time the damages are ascertained. The carrier and passenger may by special contract agree to a higher limit but not to a lower one. The benefit of the above limitation is not available to the carrier if the damage is caused by wilful misconduct of himself or his servants acting in the course of their employment. An action for damages should be brought within two years from the date of arrival at the destination or the date when the aircraft ought to have arrived or from the date on which it stopped. As the above provisions apply only to an "international air carriage," a carrier of an internal air carriage has not the benefit of the above limitation of liability. Nor has he the disability of having to disprove negligence. He is in the same position as a carrier by land or sea in an action by a passenger for damages for bodily harm. In India the Central Government may by notification extend the provisions of the Act to such air-carriers also ².

• 12. **Merchant Shipping Act, 1894** ³.—In England this Act enacts that the owners of a ship, British or foreign, shall not, where personal injury or death of a person carried in that or any other ship due to improper navigation of their ship takes place without their actual fault or privity, be liable beyond an aggregate amount not exceeding fifteen pounds for each ton of their ship's tonnage ⁴. This provision applies to India ⁵.

12(a). **Personal Injuries (Emergency Provisions) Act, 1939** ⁶.—The effect of this enactment is that in respect of a war injury ⁷ as defined by this Act, the person injured would get compensation from the State and cannot sue as a private person who would be otherwise liable under the common law or under the Workmen's Compensation Acts (1925 to 1938) and the Employers' Liability Act. If it is not a war injury, liability would depend on the ordinary law or the above Acts. The Act provides that a scheme may be made by the Minister of Pensions with the approval of the

1. Sch. I, Chap. III. For injury to property, see below, Chap. XV, para. 2. 2. S. 4.

3. 57 & 58 Vict. c. 60. s. 503; see also 61 & 62 Vict. c. 14. As to limitation of liability for injury to property, see below, Chap. IV, para. 48. The statutory liability can be excluded by contract; *The Satanita*, (1897) A.C. 59.

4. The period of limitation for a suit against the owners is two years; Maritime Convention, Act, 1911, s. 8.

5. S. 509. See also Indian Railways Act, 1890, s. 82. 6. 2 & 3 Geo. 6 c. 82.

7. E.g. see *Smith v. Davey Paxman & Co.*, (1943) 1 A.E.R. 286 C.A.; *Taylor v. Sims*, (1942) 2 A.E.R. 375; below, Chap. XIV, para. 93 (a).

Treasury for the making of payments for war injuries in the present emergency.

13. Battery.—This is the name now given to the intentional application of force to a person without lawful justification, and corresponds to the offence known as 'the use of criminal force' in the Indian Penal Code¹. Battery need not be accompanied by any bodily harm; to use the words of Holt, C.J., "the least touching of another in anger is battery."² When it causes bodily harm, it constitutes also a graver wrong. The mere use of force is regarded as unlawful on account of the insult to the dignity of the human person and its tendency to cause a breach of the peace. 'Battery' was originally the name for every actionable trespass to the person including bodily harm, but later on, was restricted to an intentional trespass involving insult. In an action for battery, the plaintiff must prove, first, the use of force to him. It may be directly to his body, *e.g.*, slapping or pushing, bringing an object into contact with him like setting a dog or throwing a stone on him. It may be also to some object in contact with him *e.g.*, touching his coat, upsetting the carriage on which he is seated, or a ladder on which he is standing,³ whipping the horse on which he is riding and making it throw him off. Secondly, the use of force must be intentional and without lawful justification; jostling one another in a crowd is not battery, though it is otherwise if it is deliberate.⁴ Consent, express or implied, is a lawful justification.⁵ It may be implied from the situation or relationship of the parties, *e.g.*, a friendly push or shaking hands.⁶ Similarly there may be authority under law or statute, *e.g.*, a parent chastising a child, a policeman laying hands on a person for arrest under a warrant,⁷ forcible feeding of a prisoner in jail on grounds of necessity.⁸ Where a lawful justification is absent, even the least use of force is unlawful.⁹

1. S. 350, I.P.C.

2. *Cole v. Turner*, (1704) 6 Mod. 149; see also his remarks in *Ashby v. White*, (1703) 2 Ld. Raym. 938, above, p. 22.

3. *Collins v. Renison*, (1754) 1 Sayer 138.

4. *Cole v. Turner*, above.

5. Under the old procedure it would be pleaded under the general issue, and it was said an assault or battery with consent is a contradiction in terms and a denial of the wrong itself and not an excuse of it; see *Christopherson v. Sare*, (1848) 11 Q.B. 473.

6. *Tuberville v. Savage*, (1669) 1 Mod. p. 3.

7. *R. v. Kempthorne*, (1910) 55 Sol. J. 126; if the arrest is unlawful, it is a battery, *Rawling v. Till*, (1837) 3 M. & W. 28.

8. *Leigh v. Gladstone*, (1909) 25 T.L.R. 139; *Ainsworth Ex-parte*, (1910) 74 J.P. 53.

9. *Forde v. Skinner*, (1830) 4 C. & P. 239 (cutting off the hair of the plaintiff, a pauper, in a poor house); *Latter v. Braddell*, (1881) 44 L. T. 369; *Agnew v. Johnson*, (1877) 13 Cox. C. C. 625 (medical examination of a prisoner without legal authority); *Green v. Goddard*, (1704) 2 Salk. 641 (taking a chattel away from another's hands); *Coward v. Baddeley*, (1859) 4 H. & N. 478 (defendant officiously laying hands on the plaintiff and turning him round and telling him how he must extinguish a fire).

14. Assault.—This word means here, as in the Indian Penal Code,¹ an attempt or threat to commit a battery, and may be described as an inchoate battery. In ordinary speech, as well as in some legal contexts,² it includes a battery. In the English criminal law it includes a false imprisonment. An assault is a tort and a crime for the same reason as battery, *viz.*, its tendency to provoke a breach of the peace. In order to make out the tort of assault, the plaintiff must prove, first, that there was some gesture or preparation which constituted a threat of force. Mere words are not enough, nor passive conduct, like standing in a doorway to obstruct an entrance.³ Secondly, the gesture or other action must cause reasonable apprehension of force. There can be no such apprehension where a child shakes its fist at an adult, or a man in a closed room or at a great distance does so at a person outside, or a person aims a gun at another who knows it to be unloaded.⁴ Lastly, assault must be intentional. A mere threat or menace not showing an intention to use instant force is not an assault. Whether there was a reasonable apprehension and whether there was an intention to cause it are questions of fact.⁵ A well-known and old illustration is *Tuberville v. Savage*.⁶ In that case the plaintiff was said to have laid hands on his sword in a threatening manner and said, "Were it not assize time, I would tell more of my mind," meaning thereby that as it was then assize time and violence during that time was then punished with very great severity, he could not make up his mind to use his sword. It was held that this could not create any apprehension which could justify the defendant in his using force and injuring the plaintiff.

15. False Imprisonment.—False imprisonment means the total restraint of a person's liberty without lawful justification. The word 'false' in that phrase signifies the unlawful character of the restraint. False imprisonment is a tort and as it was usually accompanied with force or threat of force was regarded at a very early time as an assault or trespass.⁷ It is also a crime known as 'assault' in England and as 'wrongful

1. S. 351; see also Stephen's Digest of the Criminal Law of England, Art. 340.

2. Pollock, Torts, p. 171; *e.g.*, the term 'indecent assault'; see also 24 & 25 Vict. c. 100; Larceny Act, 6 & 7, Geo. V. c. 50, s. 23 (3); the draft criminal code of 1879; Salmond uses it in this sense, Torts, p. 368.

3. *Innes v. Wylie*, (1843) 1 C. & K. 257.

4. *R. v. St. George*, (1840) 9 C. & P. 483, 493; Pollock, Torts, p. 214; but see *Blake v. Barnard*, (1840) 9 C. & P. 626; *R. v. James*, (1844) 1 C. & K. 530; *R. v. Duckworth*, (1892) 2 Q. B. D. 83.

5. *Martin v. Shoppie*, (1828) 3 C. & P. 373; *Stephens v. Myers*, (1830) 4 C. & P. 349; *Reud v. Coker*, (1853) 13 C. B. 850 (1 farthing damages); *Cama v. Morgan*, (1864) 1 Bom. H. C. 205; *Birbal Khalifa v. E.*, (1903) 1 I.L.R. 30 Cal. 97; 6 C.W.N. 342; *Jayaram v. E.*, (1914) 12 A.L.J. 154; 23 I.C. 183.

6. (1669) 1 Mod. 3; it was during the latter half of the reign of Charles II. The punishment would in that case have been chopping of the hand which drew the sword.

7. *Bracton, Note Book*, II pl. 314 (A.D. 1229); pl. 405; Street, Vol. I, p. 13.

confinement' in the Indian Penal Code ¹. In an action for damages for this tort, the plaintiff should prove, (a) his imprisonment, and (b) that it was caused by the defendant or his servants acting in the course of their employment. On proof of these facts, the plaintiff's case is complete, and it is then for the defendant to prove a lawful justification and not for the plaintiff to prove its absence. The plaintiff need not prove any wrongful intention or negligence ² on the part of the defendant. If the defendant cannot establish a justification recognised by the law, he cannot merely plead a *bona fide* or even inevitable mistake, as where he executed a warrant of arrest against the wrong man.³ It is also unnecessary for the plaintiff to prove malice or an improper motive.⁴

16. Imprisonment.—An imprisonment means a total and not a partial restraint. A mere restraint or obstruction of movement in one direction is not an imprisonment and actionable as such. It is however, an offence under the Indian Penal Code ⁵ and may also be actionable by reason of damage resulting from it⁶. In *Bird v. Jones* ⁷ the plaintiff was prevented from going along a public way which was enclosed by the defendant for seats to view a regatta, but he was at liberty to go back. It was held that he could not sue for false imprisonment. Similarly where a person who had taken a ticket for a ferry and gone to an enclosure of the ferry company was not allowed to go back without paying the charge for so doing lawfully leviable by the rules of the company it was held that there was no imprisonment ⁸. Where the plaintiff, a boy aged ten, was placed by his mother at the defendant's school and she came to the defendant and wanted to take the boy home for a few days, and the defendant refused to do so unless his dues were paid, it was held that there was no imprisonment of the plaintiff, as no restraint was placed on his will ⁹. Similarly where a minor at the bottom of the defendant's mine asked for, and was not allowed, the use of a lift to go up to the surface before the usual hour and was thus detained for a short time, it was held that there was no imprisonment, since the plaintiff had by going in agreed to abide by the

1. S. 340, I.P.C.

2. In *Harnett v. Bond*, (1925) A.C. 669, at p. 684. Viscount Cave suggested a distinction between an action for false imprisonment and one for negligence.

3. It is, however, a defence in a criminal prosecution: s. 76, I.P.C.

4. *Shearer v. Shields*, (1914) A.C. 808 5. S. 339, I.P.C.

6. *Bird v. Jones*, (1845) 7 Q.B. 742, 755, per Lord Denman, C.J.

7. (1845) 7 Q.B. 742; *Mahanmad Yusufuddin v. Secretary of State for India*, (1903) L.L.R. 30 Cal. 872; 30 I.A. 154 (P.C.); *Maharani of Nabha v. Madras*, (1942) 2 M.L.J. 14; affirmed by the Fed. Court, below, Chap. XIX, para. 37(a).

8. *Robinson v. Balmain New Ferry Co.*, (1910) A.C. 295.

9. *Herring v. Boyle*, (1834) 1 Cr. M. & R. 377; cf. *Hunter v. Johnson*, (1884) 13 Q.B.D. 225 (a child locked up in a school for half an hour after time for failing to do the home work, held imprisonment unlawful and a criminal offence).

conditions on which he could go out ¹. Where a person was arrested and then let out on bail, it was held that there was no imprisonment after his release on bail ². If the deprivation of liberty is complete, it amounts to an imprisonment and need not be a confinement in a prison; *e.g.*, where a constable tells a person on horseback that he is under arrest and the person follows him to the police station; ³ where a person is prevented from leaving his house or ship; ⁴ internment of a person within an area; detention of a person in a public street against his will ⁵. Nor is any actual application of force or threat of force necessary, *e.g.*, a policeman telling another that he has a warrant for him. Where a person who was lying ill in bed was told that he was under arrest unless he gave up a certain document or found bail, and he being unable to procure bail gave up the document, it was held that he could sue for an imprisonment.⁶ Where a Superintendent of Police sent a letter illegally directing the plaintiff to present himself before a magistrate, and sent two constables to prevent his speaking to anyone, he was held liable for false imprisonment.⁷ Where the defendant had posted policemen outside the plaintiff's premises to prevent his egress, it was held that the plaintiff was imprisoned though he was unaware of the restraint.⁸ It has also been held that a prison official who detains a prisoner beyond his term⁹ or places him in a wrong part of the prison or with a wrong class of prisoners,¹⁰ acts in excess of his authority and is liable for false imprisonment. But it is not every breach of the Prison Rules that will furnish a prisoner a cause of action for damage against the authorities concerned.¹¹

17. Imprisonment by the defendant.—The imprisonment must have been caused by the defendant or his agents or servants acting in the course of their employment. Where a person charges another with a crime before a magistrate, who thereupon remands the latter to custody, the arrest is in law the act of the magistrate in the exercise

1. *Herd v. Weardale Steel, Coal and Coke Co.*, (1915) A.C. 67; see also *Burns v. Johnston*, (1917) 2 Ir. 137 (refusal to unlock factory gates to allow the workman to leave before time, not false imprisonment).

2. *Muhammad Yusufuddin v. Secretary of State for India*, (1903) I.L.R. 30 Cal. 872; 30 I.A. 154; see also *Berry v. Adamson*, (1837) 6 B. & C. 528.

3. *Per Tindal, C.J. in Grainger v. Hill*, (1838) 4 Bing. N.C. 212; *Chin v. Morris* (1826) 2 C. & P. 361. 4. *Warner v. Riddiford*, (1858) 4 C.B.N.S. 180.

5. *Mee v. Cruickshank*, (1902) 86 L.T. 708.

6. *Grainger v. Hill* above; cf. *U. Thwe v. Kim*, (1928) I. L. R. 7 Rang. 598.

7. *Parankusam v. Stuart*, (1865) 2 M. H. C. 396.

8. *Meering v. Graham White Aviation Co.*, (1919) 122 L. T. 44.

9. *Migotti v. Colvill*, (1879) 4 C. P. D. 283; cf. *Morris v. Winter*, (1930) 1 K. B. 243.

10. *Cobbett v. Gray*, (1852) 4 Ex. 129; see also *Baileab v. R.*, (1903) I.L.R. 30 Cal. 95; 6 C. W. N. 511 (where a prisoner was illegally confined in a cell on his refusal to have enema administered to him).

11. *Arbon v. Anderson*, (1943) 1 K. B. 252; below, Chap. XVII, para. 8.

of his discretion and not that of the complainant.¹ If the complaint turns out to be false, and the accused is set at large, his remedy is not an action for false imprisonment but an action for malicious prosecution. The reason is in the language of Willes, J., in *Austin v. Dowling*,² "the opinion and judgment of a judicial officer are interposed between the charge and the imprisonment." A magistrate is not in law the agent of the complainant to cause the arrest of the accused. On the other hand if A got a police-officer to arrest B and the police-officer acted merely as the ministerial agent of A, A is liable in an action for false imprisonment.³ If however a police-officer on receiving a complaint or on suspicion arrests a person in the exercise of his powers under the common law or under a statute like the Code of Criminal Procedure⁴ in India, then the complainant is not liable for false imprisonment but can be sued only for malicious prosecution.⁵ It will depend on the facts in each case whether the arrest by a police-officer was caused in a ministerial capacity and in compliance with the complainant's request or in the exercise of his own powers.⁶ An arrest of the judgment-debtor or attachment of his goods in execution of a decree of a civil court is the act of the court executing the decree under the Civil Procedure Code in India.⁷ Such is also the case with an arrest or attachment before judgment.⁸ Therefore if a person procures these processes improperly, he is liable for malicious prosecution or abuse of process and not for trespass to person or property.⁹ If however he procures or actively participates in an act not authorised by a judicial warrant, e.g., arrest of the wrong man or attachment of the wrong property, he will be liable in trespass.¹⁰ The rule enunciated in *Austin v. Dowling* as

1. *Austin v. Dowling*, (1870) L.R. 5 C.P. 534; *Brown v. Chapman*, (1848) 6 C.B. 365; *Carratt v. Morley*, (1841) 1 Q. B. 18; *West v. Smallwood*, (1838) 3 M. & W. 418; *Mammoth Nath Dutt v. Cossipore Municipality*, (1905) 9 C. W. N. 736.

2. (1870) L. R. 5 C. P. 534, 540. The defendant charged the plaintiff at a police station with feloniously taking his goods and the plaintiff was thereupon detained there and taken the next day to a Magistrate, who after hearing discharged him. *Held*, false imprisonment only until he was taken to the Magistrate.

3. *Austin v. Dowling* above; *Flower v. Royle*, (1808) 1 Camp. 187; *Gouri Prosad v. Chartered Bank*, (1925) I.L.R. 52 Cal. 615; *Sadik Hossain v. Tuffanul*, (1939) 43 C.W.N. 1080. 4. Ss. 65, 77, 78. 5. *Pande v. Pande*, (1905) I.L.R. 29 All. 44; 3 A.L.J. 650.

6. *Sewell v. National Telephone Co.*, (1907) 1 K.B. 557 (signing a charge-sheet before the police is not imprisonment); cf. *Clubb v. Wimpsey*, (1936) 1 A.E.R. 60; see also *Grinham v. Willey*, (1839) 4 H. & N. 496; *Cooper v. Harding*, (1845) 7 Q.B. 228; *Graham v. Gidney*, (1933) I.L.R. 60 Cal. 955. 7. Order 21, r. 24, C.P.C. 8. Order 38, C.P.C.

9. *Bheema Charlu v. Danti*, (1874) 8 M.H.C. 38; *Raj Chunder Roy v. Shama Sundari*, (1879) I.L.R. 4 Cal. 583; *Nanjappa v. Ganapathi*, (1911) I.L.R. 35 Mad. 598, 602; 21 M.L.J. 1052; for other cases, see below Chap. VIII, para. 16.

10. *Willey v. McConnell* (1849) 13 Q.B. 603; *Ramanathan Chetty v. Meera Saiboo*, (1930) 61 M.L.J. 330 (P.C.); 1931 P.C. 28; see also *Velji Bhimsey & Co. v. Bachoo Baidas*, (1924) I.L.R. 48 Bom. 691; 28 Bom. L.R. 349. As to responsibility of party where the mistake is made by officer of court, see *Smith v. Sydney*, (1870) I.L.R. 5 Q.B. 203; *Fisher v. Pearse*, (1885) I.L.R. 9 Bom. 1. For cases of attachment of goods see below Chap. VIII, para. 16.

regards judicial acts is only an application to a special set of facts of a general rule of causation. In *Harnett v. Bond*¹ the plaintiff Harnett having been duly detained as a lunatic in a house licensed for the reception of lunatics was granted leave of absence on trial under the Lunacy Act for 28 days. The order granting leave empowered Dr. Adam, the manager of the licensed house, to take back the plaintiff before the expiry of that period if his mental condition required it. On the second day of his leave the plaintiff went and saw the defendant Dr. Bond, a Commissioner in Lunacy, who phoned to Dr. Adam that the plaintiff was not in a fit state to be free. Thereupon Dr. Adam sent a lorry with attendants to retake the plaintiff and took him and detained him. The House of Lords held that the defendant could not be liable for the detention caused by Dr. Adam in the exercise of his own judgment.

18. Defence of Public Authority in actions for false imprisonment.—The tort of false imprisonment has a special importance as the State and its officers are often called upon in courts of law to justify the imprisonment caused at their instance, and their defence of public authority often raises questions of first-rate importance in constitutional law and the law of liberty of the subject. This defence is in its general aspect discussed later on but may be noticed here in relation to the authority conferred by law on various persons in the realm to arrest or imprison others. This authority falls under the following four heads.

19. Judicial authority.—The general rule of immunity of judicial officers is well-settled in England and is laid down in India by the Judicial Officers' Protection Act.² No action will lie against a judge for false imprisonment or for any other tort if he acted within his jurisdiction or believed in good faith that he had jurisdiction.³ And no action will lie against a ministerial officer who executes a lawful warrant of a court of justice, whether the court had jurisdiction to issue the warrant or not.⁴ The warrant is however no protection to him if it was on the face of it irregular or illegal,⁵ e.g., if it was unsigned by the magistrate or

1. (1925) A.C. 669; (1924) 2 K.B. 517 (C.A.).

2. Act XVIII of 1850. Below Chap. XVIII, para. 14.

3. *Hammond v. Howell*, (1678) 2 Mod. 218; *Kemp v. Neville*, (1861) 10 C.B.N.S. 523; *Houlden v. Smith*, (1850) 14 Q.B. 341; *Calder v. Hall*, (1839) 3 Moo. P.C. 28; *Carratt v. Marley*, (1841) 1 Q.B. 18.

4. *Henderson v. Preston*, (1898) 21 Q.B.D. 362; *Morris v. Winter*, (1930) 1 K.B. 243; S. 78, I.P.C. seems to require good faith for the defence in a criminal prosecution.

5. S. 75, Crl. Procedure Code; see *Alter Kaufman v. Govt of Bombay*, (1891) I.L.R. 18 Bom. 636; *Painter v. Liverpool Gas Co.*, (1836) 3 A. & E. 433; *Horsfield v. Brown*, (1932) 1 K.B. 355; *Mt. Chabai v. Mt. Chunnabai*, 1937 Nag. 237. See *Mathen v. District Magistrate*, I. L. R. (1939) Mad. 744; (1939) P. C. 213 (undated extradition warrant not illegal).

judge without the seal of the court,¹ or did not mention the name of the person to be arrested,² like a general warrant,³ or mentioned the name of a different person.⁴ An officer may also lose the protection conferred by a valid warrant by making an arrest in an improper or irregular manner, *e.g.*, without having the warrant with him at the time of the arrest.⁵

20. The authority incident to the apprehension of criminals, suspects and dangerous persons like lunatics.—The power of private persons and police-officers to arrest or confine such persons is recognised by the common law, but is nowadays defined by statute to avoid uncertainty. Under the English common law⁶ a private person has the power to arrest another in the act of committing a felony or a breach of the peace. He can also arrest on reasonable suspicion of felony, provided a felony had been committed. A police-officer has the additional power of arresting on reasonable suspicion of a felony whether a felony had been committed or not.⁷ These powers are now supplemented by statutes in England.⁸ In India the Criminal Procedure Code⁹ enacts that "any private person may arrest without a warrant any person who in his view commits a non-bailable and cognisable offence," (*e.g.*, murder, grievous hurt with dangerous weapons, theft, robbery, dacoity, arson, offences against coinage), and that he shall without unnecessary delay make over the person arrested to a police-officer, or in the absence of a police-officer take such person to the nearest police station. Besides every citizen is required to act in aid of public officers in the apprehension of criminals, prevention of

1. In *re James Hastings*, (1872) 9 Bom. H.C. 154; *Subramanya v. E.*, (1883) I.L.R. 6 Mad. 396; *Abdul Gafur v. R.*, (1896) I.L.R. 23 Cal. 896; *Mahajan v. E.*, (1915) I.L.R. 42 Cal. 708; 19 C.W.N. 224.

2. *Hoye v. Bush*, (1840) 1 M. & G. 775; *E. v. Gaman*, (1913) 14 Cr. L.J. 142.

3. *Leach v. Money*, (1763) 3 Burr. 1692; *Caudle v. Seymour*, (1841) 1 Q. B. 889; *Janokee Nath v. Joy Kishen*, (1871) 15 W.R. 4; *E. v. Hargobind*, (1912) I.L.R. 35 All. 1; 10 A.L.J. 355.

4. *Dunstan v. Paterson*, (1857) 2 C.B.N. S. 495; *Diamond v. Minter*, (1941) 1 A.E.R. 390; as to trover for seizure of the wrong person's goods, see *Glasspoole v. Young*, (1829) 9 B. & C. 696; *Balme v. Hutton*, (1833) 9 Bing 471.

5. *Horsfield v. Brown*, above.

6. Stephen, *History of Criminal Law*, Vol. I, p. 193; *Timothy v. Simpson*, (1835) 1 C. M. & R. 757; *Allen v. Wright*, (1838) 8 C. & P. 522; *Walters v. Smith & Son*, (1914) 1 K.B. 595; *Barnard v. Gorman* (1941) A.C. 378, at p. 390, 391.

7. *Shearer v. Shields*, (1914) A.C. 308 (police-officer held liable for absence of reasonable grounds of suspicion); see also *Connors v. Pearson*, (1921) 2 Ir. 51; *McArdle v. Egan*, (1934) 150 L.T. 412.

8. Odgers, *Common Law*, pp. 486, 487; Halsbury, Vol. IX, pp. 89-96; Vol. XXV, p. 323.

9. S. 59; see *Gopal Naidu v. R.*, (1922) I.L.R. 46 Mad. 605; 44 M.L.J. 655; *Gouri Prosod v. Chartered Bank*, (1925) I.L.R. 52 Cal. 615; *Graham v. Gidney*, (1933) I.L.R. 60 Cal. 955; *Abdul Aziz v. Emp.*, 1933 Pat. 508 ('in his view' does not mean 'in his opinion').

breaches of the peace, dispersal of unlawful assemblies, and for that purpose may cause or help in the arrest of others.¹ A police-officer is given the power of arrest in a number of cases,² e.g., on reasonable suspicion or complaint or credible information of cognisable offences, which are enumerated in a schedule of the code and include serious offences against person, property and coinage, but not offences like forgery, cheating, or offences against the State like sedition. There are numerous enactments in England and in India which confer similar powers of arrest or confinement of private persons or public officers in the case of special offences, e.g., offences under the Railways Act and Explosives Act. The power to arrest and confine dangerous lunatics is exercised under the Lunacy Act.³ The general rule in these cases is where a person or officer purports to exercise a common law or statutory authority, he must bring himself within the ambit of that authority and must conform to the conditions or formalities prescribed for its exercise. If he acts in excess of it or exercises it irregularly, his defence fails, though he may have *bona fide* believed that he had the power or that he was acting lawfully.⁴ If he is a superior officer, his warrant affords no protection to his ministerial agents, and an action will lie against all concerned in the unlawful confinement unless it is otherwise provided by the statute.⁵ In *Sinclair v. Broughton*⁶ the defendant who was an officer commanding in a military cantonment was held liable to pay damages for confining the plaintiff on suspicion of his being of unsound mind and with a view to his being medically examined. The Privy Council held that the defendant did not adopt the procedure under the Lunacy Act then in force and had no power under that Act to confine an alleged lunatic with a view to a medical examination. But where a person is exercising a statutory power in accordance with the provisions of the statute and in good faith, no action will lie against him on the ground that he exercised it carelessly or erroneously.⁷

1. Ss. 42, 43, 128.

2. S. 54.

3. Act IV of 1912 in India; (1890) 53 & 54 Vict. c. 5 amended by (1891) 54 & 55 Vict. c. 65 in England. In England the Mental Treatment Act, 1930, S. 16, protects all persons acting *bona fide* under the Lunacy Acts. See *Barnard v. Gorman*, (1941) A.C. 378 (power to arrest 'offender' under Customs Consolidation Act, 1876, S. 186, includes power to arrest a suspect). The word 'offender' is compared to 'culprit' and the etymology of the latter word explained by Lord Simon, L.C. at p. 386.

4. *Warden v. Bailly*, (1811) 4 Taunt 67 (imprisonment by military superior without authority); *Justice v. Gosling*, (1852) 12 C.B. 39 (irregular arrest); *Codd v. Cabe*, (1876) 1 Ex. D. 352; *Ledwith v. Roberts*, (1937) 1 K.B. 232; *Diamond v. Minter*, (1941) 1 A.E.R. 390; *Stevenson v. Aubrook*, (1941) 2 A.E.R. 476. See *Muhammad v. Chakkappayyan*, (1943) 1 M.L.J. 447 (no *bona fide*).
5. E.g., *Harnett v. Bond*, (1925) A.C. 669.

6. (1892) 1 L.R. 9 Cal. 341 P.C.; 9 I.A. 142; the plaintiff was not merely pronounced sane but went up to the Privy Council and "argued his own case with considerable ability." See *Re: An Intended Action by Frost*, (1936) 2 A.E.R. 182 (C.A.).

7. *Everett v. Griffiths*, (1921) 1 A.C. 631; *Harnett v. Bond*, (1925) A.C. 669; see also *Love v. Fox*, (1887) 12 A.C. 206.

21. Authority in times of war or rebellion.—In times of war or rebellion the powers of the government and its officers to invade private rights are very large; they can arrest, confine or deport persons who are dangerous to the prosecution of the war, and impress men for active service.¹ The jurisdiction of courts of law to inquire into the legality or propriety of such acts is involved in considerable uncertainty.² The practice was for Parliament to avoid the uncertainty and inconvenience of judicial enquiries by passing Habeas Corpus Suspension Acts³ during the progress of the war or other disorder, and Indemnity Acts⁴ after its cessation. During the last and the present war the Governments in England and India have adopted the precaution of obtaining beforehand statutory powers under Emergency legislation known as the Defence of the Realm Acts,⁵ and Defence of India Acts.⁶ These powers will be briefly noticed in a later paragraph.

22. Expulsion of undesirable aliens and surrender of foreign criminals.—The State and its executive officers have special powers in the matter of expelling undesirable aliens⁷ and surrendering foreign criminals to their Governments, and powers of arrest and confinement incident thereto. But these powers are now regulated by enactments like the Extradition Acts and cannot be invoked apart from such Acts.⁸

23. Prerogative powers of arrest.—Apart from the above recognised heads of authority⁹ no person or officer in the State has under the law any special power or prerogative of arrest or imprisonment of a subject of the State which is not examinable in the ordinary courts of law. "In accordance with British jurisprudence no member of the executive can interfere with the liberty or property of a British subject except on the condition that he can support the legality of his action before a court

1. *R. v. Broadfoot*, (1743) Foster 154; *R. v. Tubbs*, (1776) Cowp. 512; *Ex-parte Fox*, (1793) 5 T. R. 276.

2. *Ex-parte Marais*, (1902) A. C. 109; Stephen, History of the Criminal Law I, 207; Pollock, Torts, pp. 96, 97.

3. *E.g.*, 34 Geo. III, c. 54; as to their effect, see Dicey, Law of the Constitution, p. 224.

4. *Phillips v. Eyre*, (1869) L.R. 4 Q.B. 225; 6 Q.B. 1 (defence under the Indemnity Act passed by the Jamaica Legislature after a rebellion).

5. (1914) 5 Geo. 5 c. 8; (1939) 2 and 3 Geo. 6 c. 31. There was also an Indemnity Act after the last war, 10 and 11 Geo. 5 c. 48.

6. IV of 1915; XXXV of 1939. See also Act XXVII of 1920 (Indemnity Act passed after the Punjab disorders).

7. Aliens Act, 1905 (England); Foreigners Act, III of 1864 (India); as to a Canadian Act, see *A. G. of Canada v. Cain*, (1906) A. C. 542.

8. *Johnstone v. Pedlar*, (1921) 2 A.C. 262. But no action will lie at the instance of an alien enemy or a non-resident foreigner to whom an injury has been done under the Government's authority, below Chap. XVIII, para. 12.

9. Another is the power of military officers to arrest or confine subordinates for breaches of military law or discipline, which is now regulated by statute; below Chap. XVIII, para. 11.

of justice. And it is, the tradition of British Justice that Judges should not shrink from deciding such issues in the face of the executive."¹ This is the position under the common law and spoken of as the 'Rule of Law.' But it was not reached till after a long and bitter struggle between courts of law and the claimants of such prerogative powers. These claimants were: (i) The King and his Ministers, and (ii) The Houses of Parliament.

24. Prerogative of the King and his Ministers.—The history of royal and official prerogatives and of their final overthrow forms a large and the most interesting part of English constitutional history. The fundamental right of liberty of the subject was declared long ago by the Magna Carta² (1215) in its famous thirty-ninth clause:

"No freeman be taken or imprisoned, or disseised, or exiled, or in any way destroyed, nor will we go upon him nor will we send upon him, except by the lawful judgment of his peers or by the law of the land."

But it was only after many centuries of long and bitter struggle between Kings and Parliaments³ that this right was secured by effective remedies in courts of law—a fact which proves the practical wisdom of the common law which usually followed the reverse process of providing a remedy before defining the right. The prerogative claimed by English Kings to imprison subjects of the realm at their will⁴ finally resulted in a revolution during the reign of the Stuart Kings,⁵ and its end was marked by the Habeas Corpus Act of 1679⁶, and the Bill of Rights⁷ to which William III subscribed on his accession to the throne. Since then courts of law have the unquestioned power to give relief against any arbitrary imprisonment effected even at the royal command. They can issue a writ of *habeas corpus* to the officer arresting or the gaoler confining a person to produce the prisoner before the court and release him if they decide that the imprisonment was illegal. They can also award damages in an action for false imprisonment against the officers concerned, but not against the King himself as he is exempt from the process of his own courts. In these proceedings the royal command is no defence to the officer or agent of the Crown⁸. The next stage of the controversy was when the King's Ministers claimed a prerogative to arrest or confine subjects of the realm for reasons of

1. *Eshugbayi v. Government of Nigeria*, (1931) A.C. 662, at 670, per Lord Atkin. Statutes curtailing liberty of the subject should be strictly construed; *Nitaichandra, v. R.*, I.L.R. (1937) 1 Cal. 169; 1936 Cal. 529; *Shib Nath Banerji, v. R.*, I.L.R. (1937) 1 Cal. 309; 40 C. W. N. 1218.

2. During the middle ages it was confirmed thirty times; the confirmation in 1225 is the form in which it appears in the statute book; Holdsworth II, p. 219.

3. The Statute of Westminster, (1275) admitted the King's right by denying bail to persons imprisoned on the King's command. This statute regulated the law of bail for five centuries and a half till 1826 (7 Geo. IV, c. 64 superseded by 11 & 12 Vict., c. 42, s. 23).

4. The case of the Five Knights, Sir Thomas Darnell and others, 3 State Trials, pp. 1-235; Petition of Right (1628) 3 Char. I, c. 1; (1629) Six members' case, 3 St. Tr. (Howell), pp. 233-294.

5. 31 Char. II, c. 2; while the Act was concerned with cases where persons were confined on charges of crimes, the Habeas Corpus Act of 1816 applied to other cases of confinement also.

6. (1689) 1 Wm. & Mary St. 2, c. 2.

7. *Johnstone v. Pedlar*, (1912) 2 A.C. 262 at p. 271.

State. This was negatived in the well-known cases¹ arising out of the general warrants² i.e., warrants without the details as to name, offence etc. required by law, issued by Lord Halifax, a minister of George III, and resulting in the arrest and confinement of Wilkes and his associates on a charge of publishing a seditious libel on the King. Lords Mansfield, Camden and other judges who took part in these cases released the prisoners on an application for *habeas corpus*, and awarded heavy damages against Lord Halifax and his subordinates who were concerned in the imprisonment. They held that general warrants were illegal and that a Minister of State had no prerogative power to arrest or confine persons for political reasons. Since then there have been many instances where the liberty of the subject has been asserted against official authorities in England, India and the Colonies.³ This principle of the common law is what Dicey⁴ called the "rule of law" or the "supremacy of law," and is characteristic of the English constitution. It involves the absence of any discretionary power in the executive to impose restraint on the liberty of the subject except in due course of law, i.e., under some legal warrant or authority. It is applicable also to India but with an important difference in the actual result. In India there are enactments still in force like the Bengal Regulation III of 1818⁵ which empowers the Governor-General-in-Council to confine or deport persons for reasons of political necessity. But in England, legislation conferring on government such discretionary powers of imprisonment by statute is unknown, and would not be tolerated during normal times of peace. Emergency legislation in war-time is an exception, as we shall see presently.

25. Prerogative of the Houses of Parliament.—Though Parliament successfully resisted the prerogative of the King and his executive, it claimed a prerogative or

1. *Leach v. Money*, (1765) 3 Burr. 1692, 1742; 19 St. Tr. 1001 (£ 400 damages for false imprisonment); *Wilkes v. Halifax*, (1763) 19 St. Tr. 1406-15 (action for damages tried by Wilmot, C. J. and £ 4,000 awarded to Wilkes against Lord Halifax, Secretary of State); *Huckle v. Money*, (1763) 2 Wils. 205 (printer's devils awarded £ 300 against the officer who executed the warrant); *Wilkes v. Wood*, (1763) 19 St. Tr. 1153 and *Entick v. Carrington*, 19 St. Tr. 1030, where actions of trespass for wrongful entry and seizure of papers; £ 1,000 in the former and £ 300 in the latter were awarded; *Beardmore v. Carrington*, (1764) 2 Wils. 244; altogether there were 15 verdicts.

2. For their contents, see Dicey, *Law of the Constitution*, pp. 218-9.

3. *Mostyn v. Fabrigas*, (1774) 1 Cowp. 161; 1 Sm. L. C. 591 (Lord Mansfield awarded £ 3,000 against the Governor of Minorca for imprisoning and banishing a British subject); *Somerset's Case*, (1771) 20 St. Tr. 82; *Wolfe Tone's Case*, (1791) 27 St. Tr. 614; *Sutton v. Johnstone*, (1786) 1 T. R. 493; *Dawkins v. Lord Rokeby*, (1866) 4 F. & F. 806; *In re Allen*, (1859) 30 L.J. (Q.B.) 38; *Eshugbayi v. Government of Nigeria*, (1931) A.C. 662; for cases under the Extradition Acts, see *In re Belencontre*, (1891) 2 Q.B. 122; *In re Coppin*, (1866) L.R. 2 Ch. 47; *R. v. Wilson*, (1877) 3 Q.B.D. 42; *C. P. Matthen v. District Magistrate of Trivandrum*, I. L. R. (1939) Mad. 744; 1939 P. C. 213; *Altar Kaufman v. Government of Bombay*, (1894) I.L.R. 18 Bom. 636; *In re Rudolph Stallman*, (1911) I.L.R. 39 Cal. 164; 15 C.W.N. 1053; *Jaipal v. E.*, (1921) 65 I.C. 517 (Pat.); *In re Govindan Nair*, (1922) I.L.R. 45 Mad. 922; 43 M. L. J. 396; *Kossekechatko v. A-G. for Trinidad*, (1932) A.C. 78; for the use of the writ of *habeas corpus* in non-political cases see *R. v. Nash*, (1883) 10 Q. B. D. 454; *In re Agar Ellis*, (1883) 24 Ch. D. 317 (for recovery of children by parents or other guardians).

4. *Law of the Constitution*, pp. 183-4, 204.

5. It was extended to other provinces; see Regulation II of 1819 (Madras); XXV of 1827 (Bombay); for more recent legislation of a similar kind, see Criminal Law Amendment Act XIV of 1908; XI of 1919 (Anarchical and Revolutionary Crimes Act) now repealed; as to the validity of Reg. III of 1818, see *In re Amir Khan*, (1870) 6 B. L. R. 398. See also *Praful Chandra Mitra v. Commandant Hilfi Detention Camp*, (1933) I.L.R. 61 Cal. 197; 38 C.W.N. 299.

privilege for itself to imprison persons for contempt of its own authority and denied the power of courts of law to question or examine the legality of the imprisonment on an application of *habeas corpus* or otherwise. It was so jealous of this privilege that it regarded the conduct of a person applying for relief against it to a court of law as a contempt of its authority. At various times the Houses of Parliament and the judges have fought pitched battles over this question with varying results.¹ The privilege of Parliament to imprison for contempt is well-established, but whether a court can inquire into the existence and extent of the privilege in any case where it is pleaded, is not clear on the authorities². No such privilege attaches to the Colonial³ or Indian legislatures unless it is expressly conferred by statute⁴.

25 (a). Powers of imprisonment under Emergency legislation :—
During the last and the present world war the Government in power in England has obtained under the Defence of the Realm Acts powers of interfering with individual rights of liberty and property in derogation of the normal rule of the common law as stated above. Similar powers have been conferred on the executive in India by the Defence of India Acts. These Acts do not directly enact the powers intended to be conferred on Government but after declaring general policy leave it to Government itself to make Rules defining those powers. These Rules, especially those made in the present war, form a big code regulating the conduct of the citizen in war-time. In England Regulation 18-B of the Defence (General) Regulations, 1939, enables the Home Secretary to pass an order of detention of a person if he has *reasonable cause to believe* the latter "to be of hostile origin or of associations or to have been recently concerned in acts prejudicial to the public safety or the defence of the realm or in the preparation or instigation of such acts and that by reason thereof it is necessary to exercise a control over him." The effect of this Regulation and the corresponding Rule in India is to make important modifications in the law of false imprisonment, first, by enlarging the defence of public authority and second, by altering the mode of proving it. In *Liversidge v. Sir John Anderson*,⁵ the House of Lords held that in an action for false imprisonment by a person detained under the Regulation, the Home Secretary could not be called upon to give particulars of the grounds for detention and that the exercise of his discretionary power cannot be challenged in a court of law on the ground that there was actually no reasonable cause. The usual rule of interpretation of the phrase 'reasonable

1. See Thomas, Cases on Constitutional Law, p. 34; *Atkby v. White*, (1703) 2 Ld. Raym. 938; *R. v. Elliot*, 3 St. Tr. 294; *Stockdale v. Hansard*, (1839) 9 A. & E. 1; *Sheriff of Middlesex's Case*, (1840) 11 A. & E. 273.

2. *Case of Lord Shaftesbury*, (1677) 1 Mod. 144; *Burdett v. Abbott*, (1811) 14 East 1; *Howard v. Gossett*, (1845) 10 Q.B. 359, 411; *R. v. Graham—Campbell*, (1933) 1 K.B. 594.

3. *Doyle v. Falconer*, (1866) L.R. 1 P.C. 328; *Kelley v. Corson*, (1842) 2 Moo. P.C. 63; *Fenton v. Hampton*, (1858) 11 Moo. P.C. 347; *Barton v. Taylor*, (1886) 11 A.C. 197.

4. *Speaker of Legislative Assembly of Victoria v. Glass*, (1871) L.R. 3 P.C. 560.

5. (1942) A.C. 206. See also *Greene v. Home Secretary*, (1942) A.C. 284.

cause' is different. For instance, a police officer has the power to arrest a person on reasonable suspicion of felony. In an action for false imprisonment the police officer has to prove reasonable grounds objectively and not merely his belief in them. The objective test is applied in the law of negligence for finding out whether reasonable care has been taken.¹ The same is the case also when these phrases are used in statutes.² But the House of Lords, by a majority, ruled that the position here was different because the language and other circumstances of the statute in question and the reasons of expediency and policy that lie behind it appeared to require that the grounds for the Home Secretary's belief should not be examined in a court of law. If, however, it could be shown that the Home Secretary had really no such belief, his order would be illegal.³ But the onus of doing so is not on him, but on the person who challenges his order. He is not bound to state his reasons in the order of detention or in court when he is sued in an action for false imprisonment. The mere production of an order which is genuine and regular on its face⁴ is a sufficient answer to an action for false imprisonment or an application for Habeas Corpus. On the other hand the usual rule in this action or application is that the party causing the imprisonment should prove the justification for it. A similar position has been reached in India. Under Section 2(2) of the Defence of India Act, 1939, the Central Government is given power to make rules to empower *any authority* to make an order for the apprehension and detention of any person *reasonably suspected* of being of hostile origin or of having acted, acting or being about to act prejudicially to public safety or interest or the defence of British India. Rule 26 made under this Section however was wider in its terms and enabled the Central or Provincial Government to make an order of detention of any person if *it is satisfied* that it is necessary to do so with a view to prevent him from acting prejudicially to the defence of British India, the public safety &c. In *Keshav Talpade v. Emperor*⁵ the Federal Court held that Rule 26 was *ultra vires* as it was wider than the rule-making power in Section 2 would warrant. As regards the phrase 'reasonably suspected' the Court was inclined to place a different interpretation on it from that put on Regulation 18-B in *Liversidge's case* and to hold that there must be suspicions which are reasonable in fact and not merely suspicions which some authority not specified by the Act or Rule or left to be selected by

1. Below Chap. XIV, para 2.

2. For instances, see (1942) A.C. at pp. 229-232, per Lord Atkin.

3. *R. v. Sibnath Banerjee*, (1943) 2 M.L.J. 468.

4. *Budd v. Anderson*, (1943) 1 K.B. 642. The plaintiff had however been released earlier in an application for Habeas Corpus and the order of detention was then considered irregular; *In re Budd*, (1941) 191 L.T. (Jour.) 289.

5. (1943) 2 M.L.J. 90.

the executive might regard as reasonable. The reason for this opinion was that while in England an absolute discretion was entrusted to a person of the position and responsibilities of the Home Secretary the rules in India allow it to be conferred on any subordinate official.¹ The Federal Court, however, rested its decision on the ground that the Rule was wider than S. 2 of the Act in so far as it allowed detention with a view to prevent prejudicial conduct and without any grounds, reasonable or otherwise, for suspicion of such conduct. In consequence of this decision S. 2 (2) was amended by an Ordinance² of the Governor-General so as to comprehend the wider terms of the Rule as it stood. The result is that in India as in England executive discretion to imprison is absolute and not subject to control by courts of law. It is obvious, however, from this discussion that the Rule in India is wider in its scope and likely to operate more unfavourably against individual liberty than in England. It may be noted that the Defence of India Act provides also that no suit, prosecution or other legal proceeding shall lie against any person for anything done in good faith in pursuance of the Act or Rules made thereunder.³ This immunity is not of course available if the Act or Rule is *ultra vires* and does not confer the power sought to be exercised. The legislative practice of allowing the executive to make laws for itself and arming it with large discretionary powers beyond judicial review or control has been criticised by competent authorities⁴ as introducing a new despotism in the place of the old one which successive generations in England fought hard to overthrow. But the practice is according to influential opinion in England justified by new or extraordinary conditions and needs. The entrustment of these powers to the executive during a world war of the magnitude of the last or the present one is defended on grounds of national interest and safety. "However precious the personal liberty of the subject may be, there is something for which it may be, to some extent, sacrificed by legal enactment, namely national success in the war or escape from national plunder or enslavement."⁵ The statutory powers also differ from the prerogative powers claimed by the Kings and their Ministers two centuries ago because the former are obtained under the law and with the sanction of Parliament while the latter were claimed as part of the Royal Prerogative and above the law.⁶

1. Defence of India Act, 1939, S. 2 (5).

2. No XIV of 1943. As to validity of this Ordinance, see *R. v. Sibnath Banerjee*, (1943) 2 M.L.J. 468. 3. S. 17 (1). See also S. 16.

4. See the vigorous dissenting judgments of Lord Shaw in *R. v. Halliday*, (1917) A.C. 260 and Lord Atkin in *Liversidge v. Sir John Anderson*, (1942) A.C. 206; also "the New Despotism," by Lord Hewart C. J.; J. H. Morgan, Introduction to Robinson, Public Authorities.

5. *R. v. Halliday*, (1917) A.C. at p. 271, per Lord Atkinson and cited by Lord Wright in *Liversidge v. Sir John Anderson*, (1942) A.C. at p. 263..

6. (1942) A.C. at p. 260, per Lord Wright.

26. Remedies for injuries to the person.—

(i) An action for damages is the ordinary civil remedy.

(ii) In cases of false imprisonment an application for a writ of *habeas corpus* is an extraordinary but an appropriate remedy for ending the imprisonment. In England the application is made in the court of the King's Bench and in India before the High Courts.¹ It is available not merely against public authorities but in any other case of unlawful detention or custody, *e.g.*, a dispute between relations about the custody of a child or minor.² Applications against public authorities, especially during the last and present war, have served as occasions for judicial examination of political and constitutional issues of great interest and importance.³ Besides civil remedies, a criminal prosecution may be launched where the injury amounts also to a crime, *e.g.*, assault, battery, false imprisonment. A person may prosecute his civil and criminal remedies concurrently or successively, and one is no bar to the other. In England this is subject to two qualifications. First, where the crime is a felony, (*e.g.*, rape, maim) and not merely the lesser offence of misdemeanour, (*e.g.*, assault), the injured person should in the public interests prosecute the offender before suing him for damages.⁴ If he brings a suit before instituting a prosecution, the suit will be stayed till he takes steps for prosecuting the offender. Formerly there was said to be a merger of trespass in the felony, so as to take away the right of action altogether.⁵ The rule of merger came from a time when a conviction of the felon involved his death and the forfeiture of all his property to the Crown, and an action for damages would therefore have been futile.⁶ But it became obsolete long ago and was transformed into a rule of temporary suspension of the remedy on grounds of public policy. Secondly, in England it is enacted by statute⁷ that a summary criminal proceeding for assault, or battery, which results in a conviction or acquittal is a bar to any subsequent civil suit for the same injury. In India neither of these qualifications exists; and the civil and criminal

1. S. 491, Crl. Procedure Code; see also S. 100, Crl. Procedure Code for discovery of persons wrongfully confined. The common law writ is not available in cases falling under S. 491; *Mathen v. Dt. Magistrate, Trivandrum* 1 L.R. (1939) Mad. 744 P.C.: 1939 P.C. 213.

2. *In re Agar Ellis*, (1883) 24 Ch. D. 317.

3. *E.g. R. v. Halliday*, (1917) A.C. 260; *Greene v. Home Secretary*, (1942) A.C. 284; *Keshav Talpade v. R.*, (1943) 2 M.L.J. 90; *R. v. Sibnath Banerjee*, (1943) 2 M.L.J. 468; *R. v. Benoari Lal Sarma*, (1943) 2 M.L.J. 207 (Special Criminal Courts' Ordinance, 11 of 1942, held *ultra vires*). For other cases, see notes to paras. 23 and 24 above. An order on the application is not *res judicata* in an action for damages; *Budd v. Anderson*, (1943) 1 K.B. 642.

4. *Smith v. Selwyn*, (1914) 3 K.B. 98. Below Chap. XIX, para. 48.

5. *Higgins v. Butcher*, (1609) Yelv. 89. See *Rose v. Ford*, (1937) 3 A.E.R. 359, 362.

6. Holdsworth, Vol. III, p. 331; forfeiture was abolished by statute only in 1870; 33 & 34 Vict., c. 23, s. 1. See Winfield, Law of Tort, p. 169.

7. 24 & 25 Vict., c. 100, s. 45.

remedies are concurrent. A conviction or acquittal in a criminal court is no bar to a civil suit,¹ and is not evidence of guilt or innocence in the latter.²

27. Damages for bodily harm.—In cases of bodily harm, the damages represent (a) a solatium or satisfaction for the pain, infirmity, and attendant circumstances like mental pain, disgrace and indignity, (b) compensation for pecuniary loss, *e.g.*, medical expenses, loss of business, salary or earning capacity. Under the former head the damages may be exemplary in cases where the defendant's conduct has been wanton or reckless or calculated to insult or disgrace the plaintiff.³ On the other hand the provocation given by the plaintiff or his own negligence may be a mitigating circumstance.⁴ Under the latter head items like medical expenses or temporary loss of earnings are easy to value;⁵ but it is more difficult to estimate the prospective loss due to permanent impairment. The standard is not a perfect but only a fair and reasonable compensation in the circumstances of the case.⁶ The amount would depend on the age of the person injured, his position in life, earning capacity, expectation of life, chances of rise or fall in income, etc. The average expectation of life may be proved by a reference to annuity and insurance tables, but would also depend upon other circumstances like the plaintiff's state of health, possibility of accidents, etc.⁷ The possession of wealth or private means is not a ground for reducing damages as that would in effect make the plaintiff pay the defendant money from his own pocket;⁸ nor the fact that the plaintiff obtained a policy of accident insurance as it would mean that the wrongdoer would receive the benefit of an insurance without paying any of the premia.⁹ Similarly pecuniary or other help obtained by the plaintiff from others may not be a ground for reducing damages.

1. *Akulchandra v. Akulchandra*, (1902) 6 C.W.N. 915.

2. *Hollington v. Hewthorn & Co. Ltd.*, (1943) 2 A.E.R. 35 C.A.; *Shumboo Chunder v. Modhoo*, (1868) 10 W. R. 56; *Ali Buksh v. Shaik Sumeerooddeen*, (1869) 12 W. R. 477; *Chakka Jagga Rao, In re*, (1935) 68 M.L.J. 660; 1935 Mad. 563.

3. *Livingstone v. Rawyards Coal Co.*, (1880) L.R. 5 A.C. 25 at p. 39; as to joint-wrongdoers some of whom are innocent and others malicious, see *Clark v. Newsam*, (1847) 1 Ex. 131. As to difficulty of assessing damages for bodily pain, see per Lord Halsbury in *The Mediana*, (1900) A.C. 113, 116.

4. *Fraser v. Berkley*, (1836) 7 C. & P. 621.

5. *John Wyllie v. Secretary of State for India*, (1928) 111 I.C. 549 (Lah.); Rs. 2,665 awarded for fracture of a leg of a boy injured by the fall of a gate in a public garden; but the cost of a trip to Europe to consult a specialist was held too remote a damage. See also *Allen v. Waters & Co.*, (1935) 1 K. B. 200 (doctor's fee recoverable, though not actually paid to the doctor or even if his claim is barred.) As to loss due to inability to perform a special contract, see Greer, L.J., in *The Arpad*, (1934) P. 189 at p. 221.

6. *Armsworth v. S. E. Ry.*, (1847) 11 Jur. 759, *per* Parke, B.

7. *Rowley v. L. & N. W. Ry. Co.*, (1873) L.R. 8 Ex. 221; *Johnston v. G. W. Ry. Co.*, (1904) 2 K.B. 250.

8. *Phillips v. L. & S. W. Ry. Co.*, (1879) 4 Q.B.D. 406; 5 Q.B.D. 78; 5 C.P.D. 287.

9. *Bradburn v. G. W. Ry. Co.*, (1874) L.R. 10 Ex. 1.

Where a maid at a hotel was injured by the defendant's negligence she was held entitled to recover the wages and also the value of board and lodging which she was entitled to get from the hotel, though as a matter of fact she stayed with her father during the period in question.¹ Where a wrongdoer causes damage, all the damage which naturally flows from the wrongdoing is to be recompensed to the plaintiff. If the father out of charity or paternal feeling provided his daughter with board and lodging she was not to lose the value of a benefit which she would have got under the contract with her employers. While it is necessary to allege the heads of special damage falling under the second head mentioned above, it is not necessary to do so in respect of matters of aggravation under the first.² The damages, present and prospective, must be assessed once and for all at the time of the trial and not left to a future claim.³

28. Damages for loss of expectation of life.—In recent years the English courts have recognised loss of expectation of life as a distinct head of damages besides physical pain and suffering and pecuniary loss resulting from bodily harm. In *Flint v. Lovell*,⁴ the plaintiff was an old man of 70 years, wealthy and in good health and vigour for one of his age. By reason of the defendant's negligence in driving her car and colliding with the plaintiff's, he sustained serious injuries the result of which was, according to the medical evidence, that he was expected to live under a year while otherwise he could have lived a happy and enjoyable life for another ten years. The judge trying the case without a jury considered his shortened expectation of life and awarded £4,000. The Court of Appeal sustained this verdict though it was admitted to be on the generous side and held that the above element was rightly taken into account in assessing damages. It was also held that a claim for damages for shortened life or a prospect of an early death was not precluded by the rule in *Baker v. Bolton*⁵ that the death of a human being cannot be a cause of action. The claim is in the one case for the shortened life of a living person, and in the other for the loss sustained by one person on account of another's death.⁶ In *Rose v. Ford*,⁷ the House of Lords approved of this decision and held further that the right to recover damages on this head did not depend on the person injured realising his loss and suffering in mind on that account. Therefore, it was held that the right would pass under the Law Reform (Miscellaneous Provisions) Act, 1934⁸

1. *Liffen v. Watson*, (1940) 1 K.B. 556, per Slesser, L.J.

2. *Jansa Tansa v. Banoo*, 1936 Nag. 70. See also *Abdul Ghafter Khan v. Gokul Prasad*, I.L.R. (1936) Nag. 1 : 1936 Nag. 231.

3. *Raghubir Singh v. Secretary of State*, I.L.R. (1938) All. 658 : 1938 All. 445.

4. (1935) 1 K. B. 354. 5. (1908) 1 Camp. 493.

6. *Rose v. Ford*, (1937) A.C. 826 at p. 834.

7. (1937) A.C. 826 (£1,000 awarded under this head).

8. Below para. 40 and Chap. XIX, para. 39.

to the heirs of a girl aged 23, who was injured in a motor car collision due to the defendant's negligence, and died within 4 days during which she was unconscious. The principle was stated to be that by shortening a person's life he is necessarily deprived of something of value.¹ "A man has a legal right in his own life."² "He has a legal interest entitling him to complain if the integrity of his life is impaired by tortious acts, not only in regard to pain, suffering and disability, but also in regard to the continuance of life for its normal expectancy. His normal expectancy of life is a thing of temporal value, so that its impairment is something for which damages should be given."³ Though the above doctrine might have been implicit in the awards of damages for personal injuries in England,⁴ there is no doubt that its clear enunciation in this form was new or novel and likely to lead to special emphasis on this head of damages and to larger verdicts in this class of cases. The decision in *Rose v. Ford* like the decisions in nervous shock cases⁵ may be ascribed to the desire to afford adequate compensation in view of the increasing number of road accidents and to enlarge the responsibility for negligence in such cases, though such responsibility would ultimately be passed on to insurance companies. The decision in *Rose v. Ford* has, however, involved the English courts in great difficulty in arriving at any satisfactory principle of assessment of damages for so vague and speculative a conception as expectation of life and happiness. The decision led to many claims, especially on behalf of deceased persons and it is said that the verdicts tended to become excessive and show wide variation in different cases. In *Benham v. Gambling*⁶ the House of Lords had occasion to consider the matter again and took the opportunity to check this tendency and afford guidance on the question of assessment of damages. In an action by the father of a child aged 2½ years who was killed by the negligence of the defendant in a motor accident the lower courts awarded £ 1,200 as damages. The child was a normally healthy child living in a country village and favourably circumstanced. The House of Lords reduced the damages to £ 200. Lord Simon, L. C., delivering the judgment on behalf of the House—a judgment which, if one may say with respect, is very pleasing reading—laid down the following rules:—(a) Damages on this head should represent loss not of the prospect of the length of life but of the measure of prospective happiness. (b) The test of happiness is not subjective or what the deceased thought of his chances of happiness but an objective estimate of what those chances would be. (c) No regard must be had to financial

1. *Per* Lord Russell at p. 839.

2. *Per* Lord Wright at p. 847, adopting a passage of Baron Parke in a different context.

3. *Per* Lord Wright at p. 848. 4. *Per* Lord Wright in (1937) A.C. 826 at p. 849.

5. *Hambrook v. Stokes*; *Owens v. Liverpool Corporation*; above para. 6.

6. (1941) A.C. 157 reversing (1940) 1 All. E.R. 275.

losses and gains nor should social position and worldly possessions increase the damages. (d) The damages for the loss of life of a child of tender years with uncertain prospects of life and happiness would be smaller than those in the case of an adult with settled prospects. (e) In assessing damages very moderate figures should be chosen. These rules would perhaps have the effect of reducing future awards but it is doubtful if they really minimise the difficulty of assessing damages and making the assessment other than arbitrary or empirical. Apart from inherent difficulties, the direction to regard happiness in the abstract and apart from wealth or status may not be easy to follow or carry out. It is interesting to observe that in the guise of giving guidance on the question of assessment of compensation—a question not touched in *Ross v. Ford*—the House of Lords has in *Benham v. Gambling* really varied the basic principle of the earlier case. The loss of expectation of life as such and the loss of expectation of happiness are two different ideas and must result in different values. Therefore many of the awards¹ made on the strength of the doctrine propounded in *Ross v. Ford* would not be acceptable now. The cases on the subject beginning with *Flint v. Lovell* afford an interesting illustration of judicial legislation, far more quick and responsive to actual needs than has been usual or customary. It has been suggested² that a short enactment allowing courts to give compensation to parents for the death of their children or to near relatives of the deceased would meet the situation, as such relatives can under the present law claim compensation only for loss of service or of benefit or in the right of the deceased. English courts have set out by indirect methods to achieve what such legislation can do directly. In India the problem has not so far arisen as no litigant has apparently yet thought of such a thing as the value of life or happiness.

29. Some instances of awards of damages for bodily harm.—The following are some instances of awards of damages in England and in India. It is not surprising that the standards prevailing in this regard in a wealthy country like England should differ from those in India. It was often thought that western juries³ were prone to give large verdicts out of sympathy, but some of the recent cases show that judges can give quite generous verdicts.⁴

1. *E.g. Roach v. Yates* (1938) 1 K.B. 256 C.A., (plaintiff who became by reason of injuries a hopeless lunatic requiring two people to nurse him got £ 4,000 damages for this and other items of damage); for cause of death, see below para. 40.

2. 57 L.Q.R. 460. See also 58 L.Q.R. 53.

3. For instances of large verdicts in the U. S. A., see Sedgwick, *Damages*, Vol. IV, p. 1345.

4. See *Owen v. Sykes*, (1936) 1 K. B. at pp. 198, 199, per Greer, L. J.

*Phillips v. L. & S. W. Ry. Co.*¹ A physician whose disablement was expected to last for about 3 years was given £ 16,000, i.e., £ 15,000 for 3 years on the basis that his average annual income before the injury was £ 5,000, and £ 1,000 for the pain and suffering.

*Owen v. Sykes.*² A doctor in general practice, who was thirty-nine years of age and an athlete sustained in a motor accident permanent injuries which necessitated his employing an assistant, and also prevented him following his athletic career. The trial Judge awarded £ 10,000 which was upheld by the Court of Appeal.

*Heaps v. Perrite, Ltd.*³ A workman lost both his hands. Verdict for £ 10,000 by the trial Judge upheld by the Court of Appeal. Greer, L. J. observed that they had to consider the plaintiff's suffering throughout life, the constant necessity for assistance, the fact that enjoyment of life would have gone. "He cannot ride a bicycle or kick a football or even if he can, he cannot catch one."

*Sorabji v. Janshedji Wadia.*⁴ The Bombay High Court awarded a young man earning Rs. 450 a month as a broker Rs. 20,000 for loss of income and Rs. 10,000 for the pain and suffering due to injuries in a motor accident leading to prolonged disablement.

*Vinayaka Mudaliar v. Parthasarathy.*⁵ The Madras High Court awarded Rs. 6,000 to a boy, 16 years of age and in a humble station in life, against the trustee of a temple whose door fell on the plaintiff and crippled him for life.

*Gurdit Singh v. Fakir Chand*⁶ In a Lahore case the High Court upheld an award of about Rs. 15,000 to a person who lost his eyes as a result of a wanton assault by the defendants and thereby suffered great pain and was deprived permanently of the enjoyment of life.

30. Damages for other personal injuries.—In cases of assault, battery and false imprisonment the damages are 'at large' and represent a solatium for the mental pain, distress, indignity, loss of liberty,⁷ etc. Where these elements are present, the damages would be substantial or even exemplary. Where the invasion of right is only trivial or was provoked or deserved, the damages would be nominal or even contemptuous. Where the injury is accompanied by bodily harm compensation for such harm would also be awarded. In cases of false imprisonment the damages would be larger than in those of mere assault and would be heavy

1. (1879) 4 Q. B. D. 406; 5 Q. B. D. 78.

2. (1936) 1 K. B. 192.

3. (1937) 2 A. E. R. 60.

4. (1913) 1 L. R. 38 Bom. 552; 15 Bom. L. R. 959 (besides Rs. 6,000 for expenses of treatment).

5. (1918) 7 L. W. 415; 45 I. C. 556.

6. A. I. R. 1933 Lah. 761.

7. Cases of battery: *Hurst v. Picture Theatres, Ltd.*, (1915) 1 K. B. 1 (£ 150 for being forcibly ejected from a theatre); *Misramji v. Jivanram*, (1881) A. W. N. 131 (Rs. 1,500 for beating with a shoe; the defendant having been convicted in a criminal court was a mitigating factor); costs of criminal prosecution can be recovered, *Gangadhar v. Bhanji*, (1926) 95 I. C. 35 (Nag.); contra, *Lahori v. Ramchand*, (1931) 134 I. C. 207 (Lah.) Cases of assault: *Ramjoy v. Russell*, (1864) W. R. 370 (Rs. 300 for assaulting a man of good position); *Joypal Roy v. Mukond Roy*, (1872) 17 W. R. 280 (Rs. 200); *Narayan v. Lalman*, (1930) 134 I. C. 928 (Pat.); *Damodhar v. Vishwanath* 1933 Nag. 29 (Rs. 100).

where the defendant's act is wanton or wilful or had the appearance of official high-handedness.¹ In the well-known cases of the general warrants,² Wilkes, not a man in any great station of life, got £ 1,000 against the Secretary of State. It is said that the award was so little to the satisfaction of his friends and the populace that the jurymen were obliged to withdraw privately for fear of being insulted.³ The printer's devils got £ 300 apiece for detention for six hours although it appeared that they were civilly treated and well fed during that period. Where a person is unlawfully imprisoned on a criminal charge, damages would be assessed as in an action for malicious prosecution. The plaintiff's guilt or conduct open to reasonable suspicion of it, his bad character, or previous convictions would be mitigating circumstances⁴; the defendant's persistence in a false charge and his malice would be aggravating circumstances. Damages may also be awarded for compensating the person assaulted or imprisoned for any pecuniary loss resulting from the wrong, *e.g.*, loss of salary during the imprisonment, expenses of regaining freedom, loss of reputation or business.

31. Death.—Under the common law of England no civil action lies against a person for causing the death of another, though it lies for causing smaller injuries to the person. This anomaly has now been largely removed by legislation. It was an accident of legal history and due to the operation of two doctrines of the common law which are themselves accidental and an inheritance from the early history of the law. These two doctrines may be considered.

32. Actio personalis moritur cum persona.—This maxim which means, 'a personal action dies with the person,' is a general rule applicable to torts and prevents representatives of the deceased from suing in his right for the suffering and pecuniary loss caused to him during his lifetime by reason of the injury of which he ultimately died. The maxim was originally introduced to prevent actions of penal character like trespass and its offshoots being brought after the death of the wrongdoer against his representatives.⁵ Later on, the general language of the maxim

1. Above, para. 24, note 12; in *Harnett v. Bond*, (1924) 2 K. B. 517, the jury awarded £ 20,000 but the verdict was set aside in appeal; *Leith v. Pope*, (1779) 2 W. Bl. 1327 (£ 10,000 for arrest on false charge of felony); see *Kasturibai v. G. I. P. Ry. Co.*, (1922) 79 I. C. 245 (Rs. 1,200 awarded to the plaintiff, a lady who was prevented by the Ry. Co. for a few hours from going out, on a charge of travelling in a I Class compartment with a II Class ticket); *Gouri Prosod v. Chartered Bank*, (1925) I. L. R. 52 Cal. 615 (Rs. 1,500 for arrest by, police-officer under instructions of defendants).

2. Above, para. 24, note 12.

3. Thomas & Bellot, *Leading cases in Constitutional Law*, p. 125.

4. Under the Justices' Protection Act, 1848, when a Justice was sued for excess of jurisdiction, nominal damages of not more than 2 pence were prescribed.

5. Holdsworth, Vol. III, p. 576.

seems to have been applied—rather misapplied—to cases of death of the injured person, though to such cases the reason of the rule had no application.¹ In this extended form it prevailed in the modern law and it was only in 1934 that it was abolished by statute in England.² “The worst of these maxims is that they are so difficult to get rid of.”³ This rule does not apply to an action for a breach of contract. When a passenger was injured by the negligence of a railway company and died of the injuries sometime afterwards, it was held that his executrix could recover as damages for breach of contract the loss caused to his personal estate during his lifetime by way of medical expenses and his liability to attend to business.⁴

33. The rule in *Baker v. Bolton*.—Another rule of the common law prevents the representatives of the deceased from suing in their own right for loss resulting to them from his death, *viz.*, the rule propounded by Lord Ellenborough in *Baker v. Bolton*,⁵ that the death of a human being cannot be a cause of action. In that case the plaintiff sued the defendants, proprietors of a stage coach, for causing the loss of the society of his wife who was injured by the negligence of the defendants while she was travelling in their coach, and died of the injuries a month after. It was held that the plaintiff could recover for the loss of her society during that month but not after her death. In *Osborn v. Gillett*⁶ the plaintiff could not recover for the loss of society of his daughter who was run over and killed outright on the scene of the accident by the defendant's negligence. In another case⁷ a claim on similar facts for loss due to funeral expenses failed. In the case of the *S. S. Amerika*⁸ the rule obtained the sanction of the House of Lords. The Admiralty Commissioners sued the defendants, the owners of the *S. S. Amerika*, to recover the loss due to their having had to pay allowances and pensions to the relatives of the crew of one of His Majesty's submarines, the crew having been drowned when the defendants' ship negligently ran into and

1. *Admiralty Commissioners v. S. S. Amerika*, (1917) A. C. 38 at pp. 43, 44; *Benham v. Gambling*, (1941) A. C. at p. 160; “obscure in origin and inaccurate in expression”.

2. Law Reform (Miscellaneous Provisions) Act, 1934. As to India, see the Indian Succession Act (XXXIX of 1925), s. 345; below, Chap. XIX.

3. Lord Wright, 53 L. Q. R. 160.

4. *Bradshaw v. L. & N. Y. Ry. Co.*, (1875) L. R. 10 C. P. 189; see also *The Greta Holme*, (1897) A. C. 596 at p. 601; but otherwise if it is a pure tort; *Pulling v. G. E. Ry. Co.*, (1882) 9 Q. B. D. 110.

5. (1808) 1 Camp. 493. The rule has not been followed in Scotland, *e. g.*, *Glasgow Corporation v. Taylor*, (1922) 1 A. C. 44.

6. (1873) L. R. 8 Ex. 88.

7. *Clarke v. General Omnibus Co.*, (1906) 2 K. B. 648.

8. (1917) A. C. 38.

sank the submarine. It was held that the plaintiffs could not recover.¹ Lords Parker and Sumner traced the rule to the early history of trespass in the thirteenth century.² We have seen that the writ of trespass originally took the place of the appeal in wrongs other than felonies and gradually superseded it even in cases of felonies like robbery or larceny by the practice of the plaintiffs omitting a reference to the felony in the writ. But this could not be done where the plaintiff's cause of action itself disclosed a felony, *viz.*, causing the death of a person.³ Therefore the action of trespass was not available against a person who caused the death of another; the trespass was said to be 'drowned' or 'merged' in the felony. The same principle was applied to the action on the case in the nature of trespass for an indirect injury causing death. Thus the old doctrine of merger of tort in felony continued in the case of homicide but disappeared in the case of other felonies. The rule of *Baker v. Bolton* does not apply where the cause of action is a breach of contract, and the death of a person is alleged merely as a consequence of the breach, *e.g.*, selling impure milk or food to the plaintiff resulting in the death of his wife.⁴ In *Rose v. Ford*,⁵ Lord Atkin spoke of the rule as illogical and also showed that it had for a long time past no justification at all. "I see no reason for extending the illogical doctrine of the *Amerika* case to any case where it does not clearly apply. As to the supposed foundation of the doctrine in the law relating to felony, I will only say that, if the rule is really based on the relevant death being due to felony, it should long ago have been relegated to a museum, for deaths by negligence are often not felonious, and where they happen more than a year and a day after the wrongful act, cannot be." Though it is only a legal anachronism, the rule still survives and is part of the law of England except in so far as it has been abrogated by statute.

34. Statutory modification of the above two rules.—The result of the above two rules is that a person who caused the death of another cannot be sued in tort. His immunity was greater according as the injury was graver and killed the person outright. "It was cheaper to kill than to maim or cripple." The unsatisfactory state of the law was brought into prominence when in the middle of the last century a number of railway accidents

1. The claim failed also on the ground that the loss was a remote consequence as the payments were voluntary; as to this cf. *Bradford Corporation v. Webster*, (1920) 2 K. B. 135; *A.-G. v. Valle-Jones*, (1935) 2 K. B. 209; below, Chap. XIV, para. 76.

2. See Sir William Holdsworth's criticism of their historical explanation, Vol. III, p. 334; see also *Flint v. Lovell*, (1935) 1 K. B. 354, 363; *per Slesser, L. J.*, *Rose v. Ford*, (1937) A. C. 826 at pp. 833, 841.

3. At that time every homicide, intentional or negligent, was a 'felony'. It was only later that homicide by misadventure was a case for pardon and held finally not a crime; Holdsworth, Vol. III, p. 322.

4. *Frost v. Aylesbury Dairy Co.*, (1965) 1 K. B. 608; *Jackson v. Watson & Sons*, (1909) 2 K. B. 193.

5. (1937) A. C. 826.

occurred with fatal results. They led to the passing of the Fatal Accidents Act, 1846,¹ usually known as Lord Campbell's Act. It was followed in India by the Fatal Accidents Act, 1855² and by similar legislation in many of the American States.³ This Act was intended to abrogate the doctrine of *Baker v. Bolton* in certain respects and enable the representatives of a person killed by another to sue the latter in their own right for the loss sustained by them. But their disability to sue in the right of the deceased for the injury caused to him due to the operation of the rule of *actio personalis* continued till 1934, when the Law Reform (Miscellaneous Provisions) Act⁴ was passed in England. This disability continues in India. The Carriage by Air Acts in England and in India⁵ provide a remedy for the death of a passenger in an international air carriage.

35. The Indian Fatal Accidents Act, 1855.—It enacts that whenever the death of a person shall be caused by wrongful act, neglect or default, the party who would have been liable if death had not ensued shall be liable to an action for damages, and such action shall be for the benefit of the wife, husband, parent and child, if any, of the deceased person; and in every such action, the court may give such damages as it may think proportioned to the loss resulting from such death to the parties respectively for whose benefit such action shall be brought. The following are some of its salient features.

36. Right of action under the Fatal Accidents Act.—It confers a right of action on certain relatives,⁶ viz., wife,⁷ husband, parent which includes father, mother, grandfather and grandmother, and 'child' which includes⁸ son, daughter, grandson, granddaughter, step-son and step-daughter. In other cases the rule of *Baker v. Bolton* is unaffected. Therefore a suit by a master for loss of service due to death of his servant will not lie; nor one by a brother or other member of a Hindu joint family.⁹ 'Son'

1. 9 & 10 Vict. c. 93, s. 5; Amendment Act, 1864 (27 & 28 Vict. c. 95). See also the Shipowners' Negligence (Remedies) Act, 1905; (5 Ed. 7, c. 10) as to death occurring in ships of foreigners in ports of the United Kingdom. The F. A. Act is not affected by the Admiralty Courts Act, 1861 (24 & 25 Vict. c. 10, s. 7); see *The Vera Cruz*, (1884) L.R. 10 A.C. 59, overruling *The Franconia*, (1877) 2 P.D. 163.

2. Act XIII of 1855.

3. Wigmore I, p. 170.

4. 24 & 25 Geo. 5, c. 41.

5. Above, para. 11; below, para 42.

6. They are representatives for the purposes of the Act though not the legal representatives; *Esther Virginia v. Maurice Minney*, (1934) I.L.R. 61 Cal. 480: 38 C.W.N. 520; *Goolbai v. Pestonji*, 1935 Bom. 333: 37 Bom.L.R. 410.

7. But not a wife living in adultery and apart from the husband, *Simpson v. Hood*, (1880) 37 L.J. Q.B. 384.

8. Illegitimate children, as well as adopted children, are also included by 24 & 25 Geo. 5 c. 41, s. 2; Law Reform (Miscellaneous Provisions) (Scotland) Act, 1940, 3 & 4 Geo. 6, c. 42, s. 2; See also the Carriage by Air Act in India, 1934, Sch. II, S. I.

9. *Bishendas v. Ram Labhaya*, (1915) 32 I.C. 18 (Lah.).

includes an adopted son among Hindus but not one adopted by the widow of the deceased after his death.¹

37. Liability under the Fatal Accidents Act.—A suit lies against a person who is guilty of some wrongful act, neglect or default and would have been liable to the deceased for the injury if the latter had not died of it. These words have been understood to enable suits to be brought not merely against joint wrongdoers and abettors² but also against innocent employers, whether the employers are private persons or corporations³. But no suit will lie if the death was due to a mere accident and not due to any neglect or breach of duty of the defendant.⁴ The title of the Act which speaks of 'Accidents' should not be understood to import liability in cases of inevitable accident, or to exclude liability in cases of a wilful act like murder.⁵ In an action under the Act, the defendant has the same defences open to him as in an action by the party injured if he was alive, *e.g.*, self-defence, contributory negligence, consent, accord and satisfaction.⁶ But while the right of the dependants under the Act may be barred by consent or agreement of the deceased, the compensation payable to them cannot be limited to the sum to which he had agreed to limit it in the event of physical injury, *e.g.*, by an agreement between a passenger and carrier.⁷ The cause of action is different from his.⁸

38. Cause of action under the Fatal Accidents Act.—The cause of action as well as the measure of damages is the loss⁹ resulting to the plaintiff from the death of his relative. This has been construed in England

1. *Vinayak v. G.I.P. Ry. Co.*, (1870) 7 Bom.H.C. 113; *Shri Gopal v. Amba*, (1914) 22 I.C. 846 (Lah.).

2. *Haria v. Basant*, (1912) 16 I.C. 491 (Lah.).

3. S. 4, "person includes a body politic and a corporation." But the Indian Act (s. 1) uses, not the word 'person', but 'party'. It is strange that such a mistake in drafting should have been allowed.

4. *E. I. Ry. v. Kulidas*, (1901) I.L.R. 28 Cal. 401 P.C.; 28 I.A. 144; *Vishnu Digambar v. B.B.C.I. Ry.*, (1923) 25 Bom. L.R. 881; 1924 Bom. 278; *De Mello v. Meridian Electric Engineering Co.*, (1926) 29 Bom. L.R. 402; 1927 Bom. 357; (breach of duty includes a breach of contract); *Grein v. Imperial Airways, Ltd.*, (1937) 1 K.B. 50.

5. Cf. the use of the word in the W.C. Act, above, para. 8.

6. *Read v. G.E. Ry. Co.*, (1868) L.R. 3 Q.B. 555 (accord and satisfaction); *Haigh v. Royal Mail Steam Packet Co.*, (1883) 52 L.J.Q.B. 640; *Griffiths v. Earl of Dudley*, (1882) 9 Q.B.D. 357 (special contract); *Senior v. Ward*, (1859) 1 F. & E. 385; *Wright v. Midland Ry. Co.*, (1884) 51 L.T. 539; *Vincent v. Southern Ry. Co.*, (1927) A.C. 430; *Saghirul v. Rangoon Electric Tramway, etc., Co.*, 1936 Rang. 295 (contributory negligence); *Williams v. Mersey Docks*, (1905) 1 K.B. 804 (limitation).

7. *Nunan v. Southern Railway*, (1924) 1 K.B. 223; cf. *Grein v. Imperial Airways*, (1937) 1 K.B. 50, 85.

8. *The Vera Cruz*, (1884) 10 A.C. 59, 70, *per* Lord Blackburn; their cause of action is "new in its species, new in its quality, new in its principle, in every way new."

9. The word used in the English Act is 'injury', which is wider than 'loss'; *Ratan Bai v. G.I.P. Ry. Co.*, (1871) 8 Bom. H.C. at p. 132.

and India to mean the loss of pecuniary benefit which the plaintiff would have got from the deceased if the latter had not died¹; e.g., pecuniary savings, contributions or support by way of maintenance, education, assistance by way of services of a son or daughter estimable in terms of money.² Where there is no reasonable expectation of some appreciable benefit there is no cause of action. For instance where a father not in good health sued for loss due to the death of a son aged four, it was held he could not recover.³ There must be a reasonable expectation and not merely a speculative possibility. There can be no claim for mental pain, distress or injured feelings.⁴ The action is purely compensatory and has no place for nominal or exemplary damages.⁵ The damage should be a direct and not a remote consequence of the death.⁶ The Indian Act, unlike the English,⁷ allows the plaintiff in the action to insert a claim for pecuniary loss to the estate of the deceased, e.g., medical expenses incurred before his death. It has been held that there can be no claim for funeral expenses,⁸ though the words of the Act, "the loss caused to the parties", seem to be wide enough to include it. But in England it can now be made by reason of the Law Reform Act of 1934.⁹ In India such expenses have been allowed.¹⁰ When the plaintiff gets on another's death the whole estate from which the latter was getting an income, he sustains no loss and cannot sue.¹¹ The assessment of damage in this action is in part analogous to that in an action for permanent physical

1. *Blake v. Midland Ry. Co.*, (1852) 18 Q.B. 93; *Franklin v. S.E. Ry. Co.*, (1858) 3 H. & N. 211; *Vinayak v. G.I.P. Ry.*, (1870) 7 B.H.C. 113; *Ratan Bai v. The G.I.P. Ry. Co.*, (1871) 8 B.H.C. 130.

2. *Berry v. Humm & Co.*, (1915) 1 K.B. 627; *Taff Vale Ry. Co. v. Jenkins*, (1913) A.C. 1; *Wolfe v. G.N. Ry. Co.*, (1890) 26 L.R. Ir. 548; *Narayan v. Corporation of Bombay*, (1892) 1 L.R. 16 Bom. 254; *Devi Singh v. Mangathayammal*, 1935 Mad. 322.

3. *Barnett v. Cohen*, (1921) 2 K.B. 461; see also *Bramall v. Lees*, (1857) 29 L.T. (o.s.) 111; *Hetherington v. N.E. Ry. Co.*, (1882) 9 Q.B.D. 160; *Secretary of State for India v. Gopal*, (1913) 20 I.C. 425; *Stanis Motors Ltd. v. Vincent Peter*, (1936) 1 L.R. 59 Mad. 402; 70 M.L.J. 155.

4. *Blake v. Midland Ry. Co.*, (1852) 18 Q.B. 93; *Royal Trust Co. v. C.P.R. Co.*, (1922) 38 T.L.R. 899; *The South Indian Industrials v. Alamelu*, (1923) 45 M.L.J. 53; 1923 Mad. 565; *Nathu Ram v. Chand Kuar*, (1927) 106 I.C. 166 (All.); *Secretary of State v. Rukmini Bai*, 1 L.R. 1938 Nag. 54; 1937 Nag. 354 at p. 370.

5. *Duckworth v. Johnson*, (1859) 4 H. & N. 653; as to tendency of juries, see *Dublin etc., Ry. Co. v. Slattery*, (1878) L.R. 3 A.C. 1155, 1205; exemplary damages are allowed in some American States; Sedgwick, s. 585.

6. *Secretary of State for India v. Gokal*, (1925) 1 L.R. 6 Lah. 451 (loss of currency notes in the possession of a person killed in a railway accident, held remote).

7. *Pulling v. G. E. Ry. Co.*, (1882) 9 Q.B.D. 110; *Boulton v. Webster*, (1865) 11 L.T. 598.

8. *Dalton v. S. E. Ry. Co.*, (1858) 4 C.B. (N.S.) 296; *Clark v. London General Omnibus Co.*, (1906) 2 K.B. 648; *Esther Virginia v. Maurice Minney*, (1934) 1 L.R. 61 Cal. 480; 38 C.W.N. 520.

9. S. 1 (2).

10. *Devi Singh v. Mangathayammal*, 1935 Mad. 322.

11. *Pym v. G. N. Ry. Co.*, (1863) 4 B. & S. 396.

impairment and is governed by similar rules¹; the age, expectation of life,² health, habits, etc. of the deceased are material. But here it is necessary to ascertain the proportion of his earnings, savings or assets that his family could reasonably expect to get and for that purpose, the plaintiff's age, expectation of life, health, habits, needs, etc. will also be material.³ In a Lahore case⁴ it was held that in a suit by a young widow of a Mahomedan who was murdered by the defendant, the possibility that she might reasonably be expected to remarry and her marriage would absolve her deceased husband's estate from liability for her maintenance should also be taken into consideration. It was held in England that in an action under the Act, the damages represent the loss actually sustained by the plaintiff and therefore should be reduced by the amount of an insurance policy obtained by him on the death of another.⁵ But in the case of a common law action for physical injury and impairment, the benefit of an accident insurance for which the plaintiff has paid premia goes to him and not to the defendant.⁶ In England, however, a statute⁷ of 1908 has altered this rule and enacts that an insurance policy shall not be taken into account in an action under the Act. The principle of this statute will perhaps be followed in India where the point has not so far arisen. Pensions given to the relatives by the bounty of the Crown have been taken into account, though the fact that they are voluntary and liable.

1. Above, para. 27.

2. As to the use of actuarial tables for finding out expectation of life of the deceased, see *Mt. Koshalia v. Riaz-ud-Din*, 1936 Lah 262. The chance of being killed in the war as a member of the fighting forces or in an air raid has also to be considered; *Hall v. Wilson*, (1939) 4 A. E. R. 85.

3. See as to method of computation, Sedgwick, Vol. II, s. 574, foot-note (a); for instances see *Vinayak v. G. I. P. Ry. Co.*, (1870) 7 Bom. H. C. (O. C. J.) 113 (deceased aged 38, Dewan to Raja of Dhar paid Rs. 250 per mensem, Rs. 7,000 to widow and Rs. 3,000 to daughter); *Ratonbai v. G. I. P. Ry. Co.*, (1871) 8 Bom. H. C. 130; *Sorabji v. G. I. P. Ry. Co.*, (1870) 7 Bom. H. C. (O. C. J.) 119; *Lyell v. Ganga Dai*, (1875) I. L. R. 1 All. 60; *Kalidas v. Madras Ry. Co.*, (1904) 4 M. L. T. 238; *Gopal v. Amba Devi*, (1914) 22 I. C. 846 (Lah.); *The South Indian Industrials v. Alamelu*, (1923) 45 M. L. J. 53: 1923 Mad. 565; *Piara Ram v. Behari Ram*, (1922) 69 I. C. 354 (Lah.); *Lakshmi Chand v. Ratan Bai*, (1926) 29 Bom. L. R. 78: I. L. R. 51 Bom 274; *Dhan Singh v. Ganesh Bai*, (1927) 101 I. C. 642 (Lah.); *Nathu Ram v. Chand Kuar*, (1927) 106 I. C. 165 (All.); *G. I. P. Ry. v. Nannhi*, (1926) 96 I. C. 278 (All.); *Secretary of State for India v. Bhair Bahu*, (1926) 96 I. C. 403 (Nag.); *G. I. P. Ry. v. Janki Bai*, (1926) 96 I. C. 681 (All.); *Secretary of State for India v. Mt. Ratan Kali*, 1932 Lah. 355; *Secretary of State v. Rukhmini Bai*, I. L. R. 1938 Nag. 54: 1937 Nag. 354; *Kuppammal v. M. S. M. Ry. Co.*, I. L. R. 1938 Mad. 238: 1938 Mad. 117; *Krishnaswami v. Narayanan*, I. L. R. 1939 Mad. 306: 1939 Mad. 261.

4. *Mohammad v. Mt. Maryam*, 1932 Lah. 146.

5. *Hicks v. Newport Ry. Co.*, (1867) 4 B. & S. 403.

6. *Bradburn v. G. W. Ry. Co.*, (1874) L. R. 10 Ex. 1.

7. Fatal Accidents (Damages) Act, 1908, 82 Ed. 7, c. 7, s. 1; cf. Ry. Passengers' Assurance Companies Act, 1864, 27 & 28 Vict. c. 124, s. 35.

to be stopped in future has also to be regarded.¹ The assessment of damages has no doubt to be made as at the moment of death, but if one of the defendants dies later and before judgment it is a fact which will be considered.²

39. Other provisions as to the right of action under the Fatal Accidents Act.—An action lies though the death was caused under such circumstances as amount in law to a felony or other crime, and is neither destroyed nor suspended by the rule of merger of trespass in felony. The action must be brought within a year after the death.³

40. The Law Reform (Miscellaneous Provisions) Act, 1934.—In England this Act has abrogated the maxim *actio personalis moritur cum persona*, and enacted that on the death of any person all causes of action subsisting against or vested in him shall survive against, or for the benefit of his estate. To this rule there are four exceptions, *viz.*, causes of action for defamation, seduction, inducing one spouse to leave or remain apart from the other, and adultery. Therefore, in cases of personal injury resulting in death, the representatives of the deceased can sue in his right for the pain, suffering and pecuniary loss sustained by him by reason of the injuries. In *Rose v. Ford*,⁴ the House of Lords held that the representatives of the deceased girl who lived for four days after the injuries could recover damages also for loss of her expectation of life. The question whether, if the death was instantaneous, it could be said that there was a cause of action vested in the deceased and such damages could be awarded to his representative has been answered in the affirmative. In *Morgan v. Scoulding*⁵ the deceased, a young man of 23, while riding a motor cycle was killed instantaneously in a collision with a motor car. In

1. *Baker v. Dalgleish Steam Shipping Co.*, (1922) 1 K. B. 361; *Lory v. G. W. Ry. Co.*, (1942) 1 A. E. R. 230; but alternative claims under the Workmen's Compensation Act cannot be taken into account; *Price v. Glynea and Castle Coal Co.*, (1915) 114 L. T. 264; see also *Carling v. Libbon*, (1927) 2 K. B. 108 (as to a statutory pension). In England, under the Widows', Orphans' and Old Age Contributory Pensions Act, 1936, widows' and orphans' pensions and allowances payable under the Act cannot be taken into account.

2. *Williamson v. Thornycroft*, (1940) 2 K. B. 658.

3. *Johnson v. Cundasawmy*, (1905) 1 L.R. 28 Mad. 479; 14 M.L.J. 363. The period is extended to two years under the Maritime Conventions Act, 1911 in cases of claims against vessels; *The Culph*, (1912) P. 213; it is two years also under the Carriage by Air Acts; above, para. 11. It overrides the period prescribed by the Public Authorities Protection Act; *British Columbia Electric Ry. Co. v. Gentile*, (1914) A.C. 1034; *Venn v. Tedesco*, (1926) 2 K.B. 227.

4. (1937) A.C. 826.

5. (1938) 1 A.E.R. 28; damages, £1,000 besides £300 under the Fatal Accidents Act; see also *Edwards v. Houston*, (1937) 184 L.T. Jour., p. 24; *Trubyfield v. G. W. Ry. Co.*, (1937) 4 A.E.R. 614. Damages under this head are not "property" for which a wife could sue her husband; *Chant v. Read*, (1939) 2 K.B. 346.

an action by his administrator, damages for loss of expectation of life were awarded by Lewis, J., on the ground that the cause of action was not the death but the negligent injury or the collision which must be deemed to be anterior to the death though the interval might have been only a split second. If it were otherwise, the Act would be liable to the same comment as the rule in *Baker v. Bolton* that it made it cheaper to kill outright than after an interval. The damages which representatives can get under the Act are independent of those obtainable by dependants under the Fatal Accidents Act¹ but will be taken into account in assessing the damages under the latter Act in the case of dependants who benefit by the award of damages under the former Act.² Damages under the Act of 1934 do not include exemplary damages. They should be calculated without reference to loss or gain to the deceased person's estate consequent on his death, except in respect of funeral expenses which may be claimed. Thus the loss due to the stopping of an annuity or the gain from an insurance policy cannot be considered in assessing the loss to the estate. In view of the decision of the House of Lords in *Benham v. Gambling*³ the amounts awarded as damages in cases before 1941 would not be useful for guidance. On the question of their assessment, the following observation of Scott, L. J., may be worthy of note; "It is, so to speak, a social question, turning on the character of English society and the whole theory of politics in this country and that being so, I consider that juries are a much better guide than the judges."⁴ The difficulty of assessment is considerably enhanced by the confusion resulting from three different statutes governing compensation in cases of death, the Fatal Accidents Act, the Act of 1934 and the Workmen's Compensation Act.⁵

41. Indian Succession Act.—In India the Succession Act⁶ enacts a general rule of survival of causes of action except in certain specified cases one of which is stated thus, "other personal injuries not causing the death of the party". This would suggest that in the case of a physical injury causing death the cause of action will survive. Therefore claims for compensation for pecuniary loss, bodily pain and suffering as well as loss of expectation of life may be made by the representatives of

1. See *Feay v. Barnwell*, (1938) 1 A. E. R. 31 and *May v. Mc Alpine*, (1938) 3 A. E. R. 85, where the damages under the two heads were adjusted. See also *The Aishkarai Mendi*, (1938) 3 A. E. R. 483.

2. *Davies v. Powell Duffryn Associated Collieries*, (1942) A. C. 601.

3. Above, para. 28.

4. *Ellis v. Raine*, (1939) 2 K. B. 180, 183 C. A.

5. 58 L. Q. R. 53; 59 L. Q. R. 101.

6. Act 39 of 1925, s. 306; re-enacted from Indian Succession Act, X of 1865, s. 268 and Probate and Administration Act, V of 1881, s. 89.

the deceased.¹ In this respect the Indian Legislature would therefore seem to have anticipated the English statute of 1934 by several decades. But the rule of the Succession Act is unreasonable in so far as it prevents the survival of an action for personal injury not causing death and would, therefore, seem to require early amendment in that regard.

42. Other statutory remedies in case of death.—(i) *Employers' Liability Act*.—In England the Employers' Liability Act, 1880² confers a right of action on the representatives of a workman to whom personal injury resulting in his death is caused in the course of employment under circumstances specified in the Act.³ The damages are subject to a maximum of three years' wages earned by the workman before his death. There is no such legislation in India. (ii) *Workmen's Compensation Acts*.—Both in England⁴ and in India⁵ there are Workmen's Compensation Acts which provide for detailed scales of payments to dependants of workmen killed in the course of employment. The liability of employers to make these payments is not for any wrongful act or default on their part but is really by way of insurance of the workman against accident. (iii) *Carriage by Air Acts*.—In England, and in India, by the Carriage by Air Acts,⁶ the carrier of an international air-carriage is liable to pay damages to the members of the family of the passenger who is killed in an accident which occurs on board the aircraft or in the course of embarking or disembarking. The members of the family comprise of persons who are entitled to sue under the Fatal Accidents Act. They are entitled to sue if they have sustained damage by the death. The provisions already referred to above like the limitation of the total liability of the carrier apply here also and supersede those of the Fatal Accidents Act.

1. Cf. *Balasubramaniam v. Marian Rodrigues*, (1934) 1 L. R. 57 Mad. 951; *Bhupendra Narayan v. Chandramoni*, (1926) 1 L. R. 53 Cal. 987. Below, Chap. XIX, para. 40.

2. 43 & 44 Vict. c. 42.

3. See below, Chap. XVI, para. 24.

4. (1906) 6 Ed. VII, c. 58, s. 13. See *Avery v. L. & N. Ry. Co.*, (1938) A. C. 606 as to mode of assessing damages when some dependants claim under F. A. Act and some under W. C. Act. See also *London Brick Co. v. Robinson*, (1943) A. C. 341.

5. VIII of 1923; above, para. 10; below, Chap. XVI, para. 25.

6. Above, para. 11.

CHAPTER III.

INJURIES TO DOMESTIC RELATIONS.

1. **Injuries to domestic relations.**—From early times courts of law in England have protected the right to the security of domestic relations by means of a civil action for damages against the wrongdoer. But on account of the peculiar history of the forms of action provided in such cases, the rules which have come down to the modern law are artificial and anomalous. At the present day an action lies in the following four cases.

2. **Action by master for loss of service of his servant.**—A master can sue a person who takes away by force, entices, harbours,¹ injures² or imprisons his servant, and thereby causes loss of service to the master. The cause of action is the loss of service which must be proved.³ The action for enticement is now practically superseded by the modern action for procuring a breach of contract.⁴

3. **Action by parent for loss of service of his child.**—A parent has a right to sue a person who takes away by force, entices, harbours, injures or imprisons his child and thereby causes loss of service to the parent. Here again the loss of service must be proved and constitutes the cause of action. The usual action of enticement is the action for seduction of a daughter.⁵ The guardian or other person *in loco parentis* has similar rights of action.⁶ The parent and guardian have also the remedy by way of an application for *habeas corpus* for recovering custody of the child or ward who is detained by another unlawfully.

4. **Action by husband for loss of society of his wife.**—A husband has an action under the same circumstances⁷ for loss of the society or *consortium* of his wife caused by enticement, harbouring, inducing her to

1. *Wilkins v. Weaver*, (1915) 2 Ch. 322; see also *Blake v. Lanyon*, (1795) 6 T. R. 221; *Hartley v. Cummings*, (1847) 5 C. B. 247.

2. *Bradford Corporation v. Webster*, (1920) 2 K. B. 135.

3. *Hall v. Hollander*, (1825) 4 B. & C. 660.

4. Below, Chap. XI.

5. *Grinnell v. Wells*, (1844) 7 M. & G. 1033; *Peters v. Jones*, (1914) 2 K. B. 781; (adopted daughter); *Beetham v. James*, (1937) 1 A.E.R. 580 (illegitimate daughter); a master also can have an action for seduction of his female servant; see *Fores v. Wilson*, (1791) Peake 77; *Mc Kensie v. Hardinge*, (1906) 23 T.L.R. 15.

6. *Irwin v. Dearman*, (1809) 11 East 23; *Murray v. Fitzgerald*, (1906) 2 Ir. 254.

7. For a statutory justification in the action, see Poor Law Act, 1930; *Glamorgan County Council v. Birmingham Corporation*, (1932) 102 L.J.K.B. 6.

live away from him,¹ physical injury² or imprisonment. As regards the evidence of enticement, it would depend on the facts of each case. It was held in *Place v. Searle*,³ a *cause celebre* at the time, that it was not necessary for the husband to show that the will of the wife was overborne by the stronger will of the defendant. The defendant had been very friendly with the plaintiff's wife for some years and after an open rupture between the plaintiff and his wife in his house the defendant who had gone there told her, 'Come on, Gwen, we will go'. She left the house with the defendant. It was held that there was evidence on which a jury might find enticement. Besides the remedy of the action for enticement the husband had under the old law an action of trespass against the adulterer, which was known as the action for criminal conversation.⁴ This action is no longer available after a statute of 1857,⁵ and the husband's remedy now is to apply by a petition in the divorce court for damages against the adulterer. The remedies of an action for enticement and of a petition for divorce claiming damages for adultery are independent and based on different causes of action,⁶ but they involve nearly the same considerations in the assessment of damages. Therefore in *Menon v. Menon*⁷ where the plaintiff had settled an action for enticement by receiving a sum of 500*l.*, he could not recover any fresh damages in his petition for divorce. In England actions for enticement had become unusual and almost disused, but are said to be on the increase in recent years. They are obviously like the action for breach of promise of marriage open to the abuse of blackmail.⁸

5. **Action by wife for loss of society of her husband.**—A wife has also an action for enticement of her husband and consequent loss of his society.⁹

1. Blackstone, iii, p. 139; *Winsmore v. Greenbank*, (1745) Willes 577.

2. *Brockbank v. Whitehaven Jun. Ry. Co.*, (1862) 7 H. & N. 834; *Baker v. Bolton*, (1808) 1 Camp. 493.

3. (1932) 2 K.B. 497.

4. Blackstone, iii, p. 139.

5. 20 & 21 Vict., c. 85, ss. 33, 59, repealed by the Judicature Act, 1925, s. 139.

6. *Elliott v. Albert*, (1934) 1 K.B. 650.

7. (1936) P. 200. Mere adultery is not enticement; *Newton v. Hardy*, (1933) 149 L.T. 165.

8. See 183 L.T. (Jur.) p. 222 where the following remarks of Talbot, J., in *Delvin v. Cooper*, are cited: "It seems quite possible for a husband and wife in financial difficulties to sow the seeds of an action for enticement, and when the result has proved a financial success, to share the proceeds by staging a touching reconciliation." See also *Menon v. Menon*, above, note 14.

9. *Gray v. Gee*, (1923) 39 T.L.R. 429; *Elliott v. Albert*, (1934) 1 K.B. 650. See also Law Reform Miscellaneous Provisions Act, (1934) s. 1.

6. **Loss of service.**—In all these cases the action lies only on proof of loss of service.¹ The service may be actual or constructive. It is constructive or presumed and need not be proved in the case of a hired servant, minor child,² or wife. But in other cases it must be proved. In the case of a son or a daughter who has attained majority and is living with the parent, some actual service must be proved though it may be of a trifling character, *e.g.*, occasionally preparing tea or fetching a coat.³ No action will lie where a husband is living away from the wife having been permanently separated from her,⁴ or where a son or a daughter is rendering no service at all, and living away from the parent.⁵ Nor will it lie where a minor child is of such a tender age, for instance two or three years old, that there can be no presumption of service.⁶ Thus the law presents the anomaly and injustice of affording protection to the rich man whose daughter occasionally makes his tea, but leaving without redress the poor man whose child is sent unprotected to earn her bread amongst strangers.⁷ Where there is no loss of service, damages will not be awarded merely for mental pain or disgrace.⁸ In the case of physical injury an action will lie only where the injury is one short of death.⁹ The action for seduction or loss of service may be based upon an act which is an actionable wrong against the servant, child or wife. *e.g.*, physical violence or rape.¹⁰

7. **Measure of damages.**—In actions for these injuries damages would primarily represent compensation for loss of service and consequential damage, *e.g.*, cost of hiring another servant, payment of salary or pension to a disabled servant.¹¹ But damages are not confined to loss of service and may be awarded by way of a solatium for injured feelings. For this purpose courts would take into account the conduct, character, and position of the parties and any moral blame attached to either party, mental pain,

1. *Tikka Ram v. Sobha Ram*, 1935 All. 855, where the text is cited; in appeal, 1936, All. 454.

2. *Terry v. Hutchinson*, (1868) L.R. 3 Q.B. 599; *Maunder v. Venn*, (1829) Mood. & M. 323.

3. *Carr v. Clarke*, (1818) 2 Chit. 260; *Manvell v. Thomson*, (1826) 2 C. & P. 303.

4. *Weedon v. Timbrell*, (1793) 5 T.R. 357; *Izard v. Izard*, (1889) 14 P.D. 45.

5. *Dean v. Peel*, (1804) 5 East 45; *Hedges v. Tagg*, (1872) L.R. 7 Ex. 283; *Whitbourne v. Williams*, (1901) 2 K.B. 722.

6. *Hall v. Hollander*, (1825) 4 B. & C. 660

7. Sergeant Manning's note in *Grinnell v. Wells*, (1844) 7 M. & G. 1033 at p. 1044

8. *Lynch v. Knight*, (1861) 9 H. L. C. 577, 598; *cf. Sobha Ram v. Tika Ram*, 1936 All. 454.

9. *Baker v. Bolton*, above, Chap. II, para. 33.

10. *Mattouk v. Massad*, (1943) A.C. 588.

11. *Bradford Corporation v. Webster*, (1920) 2 K.B. 135; *A.G. v. Valle-Jones*, (1935) 2 K.B. 209 (even if the payment was not obligatory though reasonable).

disgrace, etc. In actions for seduction exemplary damages are often allowed.¹ Damages are aggravated by such circumstances as that the seducer made his advances under the guise of matrimony,² or had a child by the daughter. They are mitigated by the general levity or indelicacy of the conduct or character of the seduced³ or the negligence of the guardian.⁴ Evidence of the extent of the seducer's wealth is not relevant, though it usually comes out in some way during the trial and influences the jury in the verdict.⁵

8. History of the rules regarding injuries to domestic relations.—These rules which are highly anomalous and unsatisfactory⁶ have their roots in mediaeval and feudal notions and assumed their present form by an accident of the remedial law.⁷ The rights of the master, parent, guardian and husband were originally protected by the King's courts in the thirteenth and fourteenth centuries by the action of trespass. This was on the footing that these persons had rights of property in the servant, child, ward or wife whose abduction, injury or imprisonment was therefore regarded as a trespass. The relation of master and servant was then one of status and not of contract; and the master had an action of trespass against a person who decoyed or took away his servant. It must be remembered that at that time there was no action for enforcing a simple contract and the master could not have sued the servant for breach of contract. Therefore the action of trespass against the person who took away the servant was then the only mode of securing the rights of employers. But in this action of trespass *vi et armis* the element of force was a necessary ingredient. At a later time employers obtained a new and more convenient remedy. This was an action based on the breach of duty created by the Statutes of Labourers.⁸ These statutes were the results of the dearth of labour due to the Black Death and the economic and social revolution supervening on it in the fourteenth century. They made it a criminal offence for a servant to leave his master's service before the end of his term or for any party to receive and keep a servant who had so left. They were repealed in Elizabeth's reign, but the new action had obtained a permanent footing in the law. Though it was called an action of trespass, it was held that the trespass was not actionable *per se*, but that it was necessary to allege actual damage by reason of the loss of service; the usual phrase in the pleading was *per quod servitium amisit*, i.e., whereby he (plaintiff) lost the service. In course of time courts allowed the husband, parent and guardian to use this form of action for injury to, or enticement of, his wife, child and ward.⁹ This appears to us a perversion of procedure, but at that time was apparently warranted by the exigencies of the remedial law.

1. *Irwin v. Dearman*, (1809) 11 East 23.

2. But damages for breach of promise cannot be included; *Dodd v. Norris*, (1814) 3 Camp. 519.

3. *Scott v. Sampson*, (1882) 8 Q.B.D. 491; *Bamfield v. Massey*, (1808) 1 Camp. 460.

4. *Reddie v. Scoolt*, (1735) 1 Peake 316.

5. *Hodsoll v. Taylor*, (1873) L.R. 9 Q.B. 79.

6. *Per* Lord Sumner in *Admiralty Commissioners v. S. S. Amerika*, (1917) A.C. 38 at 54, 60. They were condemned long ago by Bentham as barbarous; Bentham's Works, Vol. I, p. 373.

7. For the history, see (1917) A.C. 44; Holdsworth, Vol. VIII, p. 427; Pollock, Torts, pp. 232-240; Street, Vol. I, p. 263.

8. (1349) 23 Ed. III, c. 2 is the earliest; Holdsworth, Vol. II, p. 459.

9. *Winsmore v. Greenbank*, (1745) Willes, 577.

For instance the older remedy of the parent was defective. As it was based on the early feudal notion of a proprietary right in the wardship or marriage of the heir, it was said not to be available for an abduction of a younger child who was not the heir. The extension of the remedy of the master for injuries to family relations accounts for the peculiar rule about loss of service. The anomaly was mitigated to some extent by the usual device of a legal fiction, *viz.*, the theory of constructive service; but it remains in those cases where actual loss of service has to be proved. By enlarging damages beyond this element of loss¹ the courts have tried to repair the defective character of the rule. In the result, the loss of service is no doubt the cause of action but nothing more than a mere peg to hang large damages upon.

9. **Application of the English rule in India.**—In India cases applying the English rule have been rare.² It is submitted that Indian courts are not bound to follow this historical relic and may adopt a rule which protects the family tie and honour as such and not illogically through a different cause of action.³ The Allahabad High Court has held that enticement of a wife with intent to have illicit intercourse should be regarded as actionable *per se*, as it is an offence under the Indian Penal Code.⁴

1. For the process of this change, see Wigmore, I, p. 138.

2. *Muhammad Ibrahim v. Ghulam*, (1864) 1 Bom. H.C. 236; *Baboo Thakur v. Subanshi*, I.L.R. 1942 Nag. 650; 1942 Nag. 99. As to actions by masters, see *Brajendra v. Luffman*, (1909) 13 C.W.N. 485; 4 I.C. 520; *Brnkowsky v. Thacker Spink & Co.*, (1870) 6 B.L.R. 107.

3. The English rule as to loss of service has no counterpart in the continental Codes. Schuster, German Civil Law, p. 341. The English rule is however generally followed in the United States, though abrogated in some states like California; Burdick, Torts, p. 320. In Canada legislation (Seduction Act 1922, R.S.A., c. 132, s. 5) allows an action to the seduced; see *Brownlee v. Mac Millan*, (1940) A.C. 802.

4. *Tikka Ram v. Sohha Ram*, 1936 All. 454. The view of Bennet, J., that such is also the English law appears open to question.

CHAPTER IV.

WRONGS TO IMMOVABLE PROPERTY.

1. **Wrongs to immovable property.**—These wrongs fall under four categories, (i) Trespass, (ii) Injury to reversion, (iii) Injury to incorporeal rights and (iv) Physical injury not amounting to trespass.

2. **Trespass.**—At the present day the word 'trespass' is generally used to refer to some disturbance of a person's possession of corporeal immovable property, like a land or house. In its etymological sense it means passing beyond, transgression, or wrong. In this wide sense it was introduced into legal terminology through the writ of trespass which came into vogue in the thirteenth century as a remedy in respect of wrongs to person and property, movable and immovable. After the introduction of actions of trespass on the case trespass acquired the limited significance of a direct and forcible injury to person or property as distinguished from an indirect or consequential injury. Actions of trespass came to be known by different names from the words of the writ in different cases. The action for a direct injury to the person was called trespass in 'assault and battery'; the action for a direct injury to the possession of land or premises was known as trespass *quare clausum fregit*, 'why he (defendant) broke into the close of the plaintiff'; and the action for injury to goods as trespass *de bonis asportatis*. Finally the term was identified with an injury to the possession of immovable property, as the other trespasses of the mediaeval law acquired other appellations. Injuries to the person were called 'assault and battery.' The action of trespass to goods became rare and was superseded by a special action of trespass on the case, known as trover, for conversion of goods. We have here an interesting instance of the vicissitudes of fortune which overtake words and phrases in the law.

3. **Points to be proved in the action for trespass.**—In an action for trespass the plaintiff should prove (i) that he was in possession of immovable property and (ii) that the defendant disturbed his possession. It is for the defendant to prove a lawful justification.

4. **Immovable property.**—This phrase¹ means in other contexts² not merely corporeal property like a land or house but also incorporeal rights and interests, *e.g.*, an easement, a right to receive rents or profits. It is less technical than the phrase 'real property' and comprehends all that it means and more, *e.g.*, the interest of a lessee for years which is not real property but only a *chattel real*.³ Here, however, this phrase is used only

1. In Indian enactments it includes 'land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth'; General Clauses Act (X of 1897), s. 3 (25).

2. *E.g.*, Indian Registration Act, s. 6 (2); *cf.* also Transfer of Property Act, s. 3; Criminal Procedure Code, s. 145; Limitation Act, Arts. 132, 142, 144.

3. *Maharana v. Dassai*, (1873) 21 W.R. 178 P.C.; 1 I.A. 34.

in the sense of corporeal property capable of physical possession, e.g., a land or house, or in the old phrase, a 'close.' It includes also such incorporeal interests as involve exclusive physical control of corporeal property, e.g., an exclusive right of fishery¹ or of digging turf² or a right to the standing crops under a purchase.³ Under section 9 of the Specific Relief Act in India which provides a special remedy for persons dispossessed of immovable property, rights of ferry,⁴ and fishery,⁵ have been held to be such property, but not a right of way⁶ or other incorporeal right not involving possession.⁷ A person who sank a well on another's land with the latter's leave and was using the water has no such right as involves possession of land and cannot be spoken of as having possession of any property; "possession of percolating water which is ever flowing in and out of a well is in truth only a metaphor."⁸ When there is an outstanding lease for a term of years the lessor of the land has only a reversion and cannot be described as a person in possession of immovable property, for the purpose of an action for trespass⁹ or under Section 9 of the above Act.¹⁰

1. *Holford v. Bailey*, (1850) 13 Q.B. 426; *Atill v. Duke of Devonshire*, (1882) 8 A.C. 135, 146; *Fitzgerald v. Fribank*, (1897) 2 Ch. 96; *Lokenath v. Jahan*, (1911) 14 C.L.J. 572; 12 I.C. 305; *Bahau v. Nagu*, (1878) I.L.R. 2 Bom. 19 at 45, 40. As to other profits a prendre, see *Cox v. Glue*, (1848) 5 C.B. 533 (right of pasture).

2. *Wilson v. Macreth*, (1766) 3 Burr. 1824.

3. *Wellaway v. Courtier*, (1918) 1 K. B. 300.

4. *Krishna v. Ahlunda*, (1890) I.L.R. 13 Mad. 54; cf. *Earl of Dysart v. Hammerston*, (1916) 1 A.C. 57; *Wahid Khan v. District Board*, I.L.R. 1937 All. 193; 1936 All. 356.

5. *Bhundal v. Pandol*, (1888) I.L.R. 13 Bom. 221; *Lokenath v. Jahan*, (1911) 14 C.L.J. 572; 12 I.C. 305; *Hill & Co. v. Shro Raj*, (1922) I.L.R. 1 Pat. 674; *Secretary of State v. District Board of Tanjore*, 1930 Mad. 679.

6. *Mangal v. Jivan Ram*, (1899) I.L.R. 23 Bom. 673; 1 Bom. I.R. 167; cf. *Nejyachandra v. Banku*, (1909) 9 C.L.J. 336; 4 I.C. 116.

7. *Fadu Jhala v. Gour Mohan*, (1892) I.L.R. 19 Cal. 544 F. B. (fishery); *Foster v. Krishna*, (1902) I.L.R. 29 Cal. 614 (hat or right to collect tolls in a market).

8. *Paine & Co. v. St. Neots Gas Co.*, (1939) 3 A.E.R. 812 (C.A., at p. 818, per Scott, L.J. See below, Chap. VI, para. 23.

9. *Buxter v. Taylor*, (1832) 4 B. & Ad. 72; *Daveod v. Jayram*, (1920) I.L.R. 44 Mad. 937; 40 M. L.J. 38.

10. On this subject the cases are not uniform among the courts or in each court; *Sitaram v. Ram Lal*, (1896) I.L.R. 18 All. 440; *Veerasami v. Venkatachala*, (1925) 50 M.L.J. 102; 1926 Mad. 18; *Ramachandra v. Sambashir*, 1926 Nag. 313, which support the rule here stated, with *Rangaswami v. Krishna*, (1911) 9 M.L.J. 305; 8 I.C. 843; *Tiruvengada v. Venkatachala*, (1916) I.L.R. 39 Mad. 1042; 30 M.L.J. 258; *Rajkumar v. Ahlunda*, (1923) 37 C.L.J. 94; 1923 Cal. 192; *Ratan Lal v. Amarsing*, (1929) I.L.R. 53 Bom. 773; 31 Bom. I.R. 1042; *Basoo v. Bhagwan Das*, (1929) 112 I.C. 314 (Pat.); *Damodar v. Lachmi*, (1928) I.L.R. 7 Pat. 496. It has also been held that s. 9 would apply to a suit by a landholder against a rival who collects rents from the ryots; *Ruthnasabhapathi v. Ramasami*, (1910) I.L.R. 33 Mad. 452; 20 M.L.J. 301; *Rajkumar v. Ahlunda*, (1923) 37 C.L.J. 94; 1923 Cal. 192. Whatever may be the position under s. 9, there is no doubt about the above rule in cases of trespass under the common law. In other contexts and for other purposes, a reversion may be capable of possession, e.g., O. 21, r. 36, C.P.C.; *Tiruvengada v. Venkatachala*, (1916) I.L.R. 39 Mad. 1042; 30 M.L.J. 258. Under s. 145, Cr. P.C., disputes about possession of 'land, water' include those about receipt of rents and other incorporeal right; see *Laldhari v. Sukdeo*, (1892) I.L.R. 27 Cal. 892; 4 C.W.N. 613; *Bulkis v. Nagoor*, (1915) M.W.N. 267; 28 I.C. 332.

5. **Possession of immovable property.**—The term 'possession' denotes an intricate and subtle legal conception.¹ In popular use it is ambiguous as we are accustomed to use it without minding the distinctions which are vital in law. Thus when I say 'I possess a house,' I often mean 'I own it'² or when I say that 'my clerk is in possession of it,' I mean it is in his 'occupation or custody.' The essential elements in this legal conception can be stated as follows: (i) the possessor has the power, however small, to use the property and exclude others from it, and the intent to possess, *animus possidendi*; (ii) no other person manifests that intent and has an equal or greater power.³ We may take a few illustrations. *A* is owner of a house and lives in it; he has then the possession besides the ownership. *A* lets it to *B* for a term of years, and *B* enters on the property; *A* has only the ownership but *B* has the possession. *A* has given one of his rooms to his guest or clerk to occupy it; *A* is in possession though it is in the occupation or custody of the guest or clerk. In this case possession becomes different from physical occupation or enjoyment, as *A* has personally the power, if he likes, to turn out the occupier and there is no *animus possidendi* in the latter. Therefore a mere lodger or guest in a house, inn or hotel cannot bring an action for trespass.⁴ But if the clerk or guest intends to stay and has the power to stay in spite of *A*, *A* has lost the possession and the occupier has acquired it though wrongfully. *A* who is an owner in possession is turned out of the house by *B*, a stranger; *B* has the possession. *B* is now turned out by *C*; *C* has the possession. Thus possession in law is different from the right to possess and may have been acquired by the commission of a tort or crime. While the idea of possession in some of these cases is built on its popular meaning of actual or apparent physical control, the law has in others extended the conception to cases where there is no actual control but the control is presumed or only notional. Just as some occupiers are not possessors, some possessors need not be occupiers as in the following cases.

1. On this subject, see Pollock & Wright, *Possession*; Holmes, *Common Law*, Ch. VI; Holdsworth, Vol. VII ss. 1 and 2.

2. "In common talk we constantly speak as though possession were much the same thing as ownership. When a man says 'I possess a watch', he generally means 'I own a watch'. Suppose that he has left his watch with a watchmaker for repair and is asked whether he still possesses a watch, whether the watch is not in the watchmaker's possession and if so, whether both he and the watchmaker have possession of the same watch at the same time, he is perhaps a little puzzled and resents our questions as lawyers' impertinences"; P. & M., Vol. II, p. 33.

3. Terry, *Principles of Anglo-Indian Law*, p. 268 cited in P. & W. on *Possession*, p. 13. The addition of 'manifestation' to Terry's statement seems to be essential. See *The Tubantia*, (1924) P. 78.

4. *Allan v. Liverpool*, (1874) L. R. 9 Q. B. 180 at p. 191, per Blackburn, J.; see also the observations of the same judge in *Roads v. Truvington*, (1870) L. R. 6 Q. B. 56 at p. 62; *Holywell Union v. Halkyn Drainage Co.*, (1895) A. C. at pp. 126, 134. The rule is otherwise, if a guest has the exclusive right of occupation of specific rooms; *Lane v. Dixon*, (1847) 3 C. B. 776.

6. **Possession without actual occupation.**—Thus if *A* is at Madras and owns a house at Delhi, he is in law in possession so long as no one occupies it adversely to *A*. Such again would be the case when *A* owns a large area of land or forest, parts of which he has never seen or to which he can have no access. If *B*, a neighbouring owner, asserts he is owner of the land or forest but has not exercised acts of enjoyment over it, the law imputes the power of control to the owner, or as it is said, possession follows title.¹ We see here to what valuable use the law puts presumptions or fictions in constructing its theory and how the needs of the law and legal policy carry the doctrine of possession away from its popular connotation.

7. **Co-owners.**—A similar instance is the case of co-owners. When *A* and *B* are two brothers owning a house in Madras and *A* occupies it or lets it and *B* lives in Calcutta for many years and does not receive any part of the rents, the law presumes the power and the animus to exist in *B* also until there is a notorious act of exclusion or denial of his title by *A*; the possession of one co-tenant is presumed to be on behalf of all.²

8. **Trespasser's possession must be effective.**—The same principle is applied in cases where there is a conflict of possessory acts between the owner and a trespasser. No doubt if a trespasser completely dispossesses the owner, thenceforward possession is with the trespasser. In other words, he must have obtained effective and peaceable possession. But the law is not overready to presume it in his favour³ and will rather consider possession to continue in the owner if he also exercises acts of possession.⁴ In *Browne v. Dawson*⁵ the plaintiff was a schoolmaster who had been dismissed by the trustees of a school and had given up his

1. *Sivasubramanya v. Secretary of State for India*, (1885) I.L.R. 9 Mad. 285, 304; *Secretary of State for India v. Nellakutti*, (1861) I.L.R. 15 Mad. 101 P.C. : 18 I.A. 149.

2. *Corea v. Appuhamy*, (1912) A.C. 230; *Ahmed v. Ramlal*, (1914) I.L.R. 37 All. 203; 13 A.L.J. 204; *Velayutham v. Subbaraya*, (1914) I.L.R. 39 Mad. 879; *Jagadeesachandra Banerji v. Taiyab Sardar*, (1934) I.L.R. 61 Cal. 377; 1934 Cal. 644; *Ahwaia Afzal v. Mohammad*, I.L.R. 1936 Nag. 177; 1936 Nag. 214; *Mangammal v. Haji Muhammad*, I.L.R. 1939 Kar. 597; 1939 Sind. 315.

3. *Glyn v. Howell*, (1909) 1 Ch. 666; *Secretary of State for India v. Krishnamoni*, (1902) I.L.R. 29 Cal. 518 (P.C.) : 29 I.A. 104; *Surendra v. Ahmed*, (1935) I.L.R. 63 Cal. 300; 62 C.L.J. 177. As to vacant land, see *Achayya v. Jalaludin*, 1938 Mad. 454; *Nagorao v. Jageshwar*, I.L.R. 1943 Nag. 726.

4. See Mellish, L.J., in *Ex-parte Fletcher*, (1877) 5 Ch. D. 809, 812; see also *Jones v. Chapman*, (1847) 2 Ex. 803, 811; *Canvey Island Commissioners v. Preedy*, (1922) 1 Ch. 179; *K. Muthavar v. Kunharan Kutty*, (1922) I.L.R. 44 Mad. 883 (P.C.) : 48 I.A. 395; *Dharichhna Kuari v. Romyad Kuari*, 1934 Pat. 485.

5. (1840) 12 A. & E. 624; see also *Holmes v. Wilson*, (1859) 10 A. & E. 503; *Borayer v. Cooke*, (1847) 4 C.B. 236; *Hemmings v. Stoke Poges Golf Club*, (1920) 1 K.B. 720; *Dadabhai v. Sub-Collector of Bioach*, (1870) 7 Bom. H. C. (A.C.J.) 82; *Raj Krishna v. Muktar-ram*, (1910) 12 C.L.J. 605; 7 I.C. 700; *Re Dharmalinga*, (1914) I.L.R. 39 Mad. 57; *E. v. Bandu*, (1927) I.L.R. 6 Pat. 794.

(b) for possession on behalf of the lessee, making him also a party to the action;¹

(c) for a declaration of title, when the trespasser takes possession under a hostile claim.²

13. Historical development of remedies of lessors and lessees and owners out of possession.—The difference in the nature of the remedy allowed to lessors and lessees is explained by historical reasons and has left its mark permanently on the law.³ Originally the remedy for recovering immovable property was what was known as the 'real action,' e.g., the action begun by the 'writ of right.' As this action became cumbrous in procedure,⁴ special and speedier remedies were introduced from time to time. The '*assize of novel disseisin*'⁵ was introduced during the time of Henry II to restore possession to disseised persons and punish the disseisor. It was modelled on the '*actio spolii*' of the canonist and the interdict *unde vi* of the Roman Law.⁶ But the lawyers of the twelfth century who borrowed the remedy borrowed also the theory of possession under the Roman Law which required an *animus domino* (intent to deal as owner), and not merely an *animus possidendi* or *tenendi*,⁷ and therefore denied this relief to the 'termor' or lessee for a term of years.⁸ According to them he had no 'seisin,' but at best only a contractual right against his lessor. Leasehold interests were treated as chattels and later on styled as 'chattels real.'⁹ "In an evil hour the English judges who were controlling a new possessory action which had been suggested by foreign models adopted this theory at the expense of the termor. He must be the *conductor* who does not possess, or he must be the usufructuary who does not possess the land but has quasi-possession of a servitude. But they cannot go through with their theory. In less than a century it has broken down. The termor gets his possessory action; but it is a new action. He is 'seised' but not 'seised of free tenement' At a somewhat later date he is not 'seised' but is 'possessed.' English law for six centuries and more will have to rue this youthful flirtation with Romanism."¹⁰

Thus 'seisin' which was originally synonymous with 'possession' came to be limited to 'possession of a freehold estate' as opposed to subordinate interests like leaseholds.

1. *Tiruvengada v. Venkatachala*, (1915) I.L.R. 39 Mad. 1042: 30 M.L.J. 258; see also *Souri Ammal v. Vellayan*, (1915) M.W.N. 12: 26 I.C. 347. He can sue alone if the lessee does not object; *Raj Kishore v. Jadunath*, (1905) 11 C.W.N. 828.

2. *Tiruvengada v. Venkatachala*, above; *Ramchandra v. Ramanmani*, (1916) 20 C.W.N. 773: 36 I.C. 890.

3. See Holdsworth, Vols. III, pp. 213-217 and VII, pp. 1-78.

4. The writ of right was subject to great delay as many excuses or 'essoins' for non-appearance were permitted in that action. It was also tried by battle; Maitland, *Equity*, pp. 319, 320.

5. 'Assize' meant originally sitting of a court or assembly; it was subsequently used to denote the things done, the enactments passed at such court or assembly; Holdsworth, Vol. I, p. 275.

6. P. & M., Vol. II, p. 48.

7. As to the exception to this rule in the Roman law (e.g., in the case of the pledgee) see Hunter, *History of Roman Law*, p. 341.

8. *Per West, C. J.*, in *Land Mortgage Bank of India v. Ahmedbhai*, (1883) I.L.R. 8 Bom. at p. 87.

9. "The effect of this reasoning upon the English land law has not been happy. It has been to exclude interests for a term of years from the category of real property—to divide our land law into halves"; Holdsworth, Vol. II, p. 205.

10. P. & M., Vol. II, p. 115.

When the inconvenience of denying relief to lessees was felt, they were allowed a new writ, *quare ejectionem infra terminum*, but its scope was limited to cases where the person who ejected the lessee was the lessor or a transferee from the lessor. It was after the introduction of the action of trespass that they got an effective remedy; in its application to lessees, it had a special name, *vis.*, *trespass de ejectione firmoe*, or *ejectio firmoe* simply. Though it was held for sometime that a lessee could recover only damages in this action he was ultimately allowed to recover the land itself from any dispossession. For owners out of possession the proper remedy was not trespass but the writ of right or the *assize of novel disseisin*. As trespass had become popular by its effective processes and the older remedies were inconvenient and cumbrous, owners were allowed to use a form of action similar to the above action of lessees known as *ejectio firmoe*. This was done with the help of many curious fictions,¹ which in an age of rigid procedure were the only means of relieving its hardships and extending old remedies to new cases.² The new action of owners came to be known as 'the action of ejectment' and was highly popular with lawyers.

14. Scope of actions of ejectment, trespass and case.—The action of ejectment was used not merely by owners out of possession but also by persons who were dispossessed by the defendant. After the Judicature Act it is simply called "an action for recovery of possession," but the old name is even now used by lawyers and judges, and applied both to actions by owners out of possession who seek to recover property on the strength of their title, and to those by persons who have been dispossessed by a trespasser. But the action for damages for trespass still retains the characteristic of being a remedy in the latter case alone. For permanent physical injury to property, a landlord or other person having a reversionary interest can have an action on the case, while the person in possession can sue in trespass and obtain damages; though at the present day both would be called actions for damages for the injury, the right and the cause of action are distinct in each case.

15. Possession without title.—Again a person whose possession was devoid of any legal right or title and might indeed have been acquired wrongfully can sue in trespass.³ This is an elementary rule of the English common law. In this respect it did not follow the Roman law which distinguished legal or juridical possession from actual possession, and gave the right to the possessory interdicts to the former and not to the latter. The plaintiff in an action for trespass should, however, prove that he had the

1. For a description of them see Maitland, *Equity*, p. 351; Holdsworth, Vol. VII, p. 12. It was made to appear as if the action was by an imaginary lessee John Doe against another imaginary person who ejected him, Richard Roe. John Doe claimed as lessee under the owner who came in as real plaintiff and his title as owner was raised as an issue in the action. Richard Roe was similarly considered to retire from the action in favour of the person in possession who was allowed to come in and defend upon the terms of admitting the fictitious allegations of a lease to John Doe, an entry by him and ouster by Richard Roe.

2. See per Lord Haldane in *Hammerton v. Dysart*, (1916) 1 A.C. 57 at p. 69.

3. *Graham v. Peat*, (1801) 1 East. 244.

possession, *i.e.*, the effective possession. If he and another wrongdoer are scrambling for possession one cannot sue the other in trespass. But if he is in possession, he is entitled to maintain it against all the world but the true owner. This is known as the rule in *Asher v. Whitlock*¹ and was stated thus: "Possession is good against all the world except the person who can shew a good title." Therefore the defendant cannot plead merely a *jus tertii*, *viz.*, that a third party has the legal right and not the plaintiff. He can however succeed if he shows the right to be in himself.² In India the legislature has gone much further by enacting section 9 of the Specific Relief Act which enables a dispossessed person to sue the trespasser and recover the property even though the latter happened to be the owner himself.³ This special remedy can be had only if the suit is brought within six months of the trespass.⁴ In suits which do not fall within section 9, the ordinary rule of English law will apply, *viz.*, that in trespass the plaintiff need only prove his previous possession and the defendant can plead his own but not a third person's title.⁵

16. Plea of *jus tertii* in an action of ejectment.—In an action of ejectment which is brought to try a question of title, the plaintiff can succeed only if he proves that he has a subsisting title, and the defendant can plead a *jus tertii*.⁶ In such cases the rule is: "The plaintiff can recover only by the strength of his own title and not by the weakness of the defendant's."⁷ The cause of action here is a wrong to ownership, while in the suits discussed above, it is a wrong to possession. It is necessary to keep in mind this distinction if we are to apply the aforesaid rules properly, and

1. (1865) L.R. 1 Q.B. 1 at p. 4; *per* Cockburn, C. J.; see also *Perry v. Glissold*, (1907) A.C. 73.

2. *The Winkfield*, (1902) P. pp. 42, 54; *Nicholls v. Ely. Beet Sugar Factory*, (1931) 2 Ch. 84.

3. *Enactoolah v. Kishan Soondar*, (1867) 8 W.R. 386, 389; *Ismail Ariff v. Mahomed*, (1893) I.L.R. 20 Cal. 834 at 842; 20 I.A. 99 (P.C.); see also the Bombay Mamlatdar's Courts Act (Bom. Act II of 1906), s. 5 (cl. 2).

4. Limitation Act, 1908, Art. 3.

5. This is the view of all the High Courts in India except that of Calcutta; see *Hannamantrav v. Secretary of State for India*, (1900) I.L.R. 25 Bom. 287; 2 Bom. L.R. 1111; *Wali Ahmed v. Afudhia*, (1911) I.L.R. 13 All. 537; *Unrao Singh v. Ramji*, (1914) I.L.R. 36 All. 51; *Narayana v. Dharmachar*, (1903) I.L.R. 26 Mad. 514; 13 M.L.J. 146; *Bodha Ganderi v. Ashoka Singh*, (1926) I.L.R. 5 Pat. 765; but see *Kiran Chandra v. Prasanna Kumar*, (1933) I.L.R. 61 Cal. 419; 38 C.W.N. 196; for other rulings on this point, see below, para. 53.

6. *Frogmorton d. Fleming v. Scott*, (1802) 2 East 467; *Doe d. Harding v. Cooke*, (1831) 7 Bing at p. 348, *per* Alderson, J.; *Dunford v. McAnulty*, (1883) 8 A.C. 456; *Ramachandru v. Vinayek*, (1914) I.L.R. 42 Cal. 384, 421; 41 I.A. 290 (P.C.); *Jaigobind v. Ramanandam*, (1928) 55 M.L.J. 56 P.C.; see also *Narayandoss v. Gulat Bi Bui*, (1927) I.L.R. 50 Mad. 927 at p. 938; 53 M.L.J. 709 (F.B.).

7. See *Roe d. Hildane v. Harvey*, (1769) 4 Burr. at p. 2487 *per* Lord Mansfield, C. J.; *Hemchand v. Peary Lal*, 1942 P.C. 64.

reconcile seemingly conflicting dicta as to the plea of *jus tertii* in actions of ejectment.¹ Especially is such caution necessary as in these actions the claim is often based not merely on title but also on a trespass. It is safer—now that forms of action are no more—to avoid these old names and look at the substance of the cause of action in each case. Whether the form of action would have been trespass or ejectment, the rule in *Asher v. Whitlock* applies if the plaintiff proves that his possession had been disturbed by the defendant.² In other cases the second rule applies and the plaintiff fails if his own case discloses, or the defendant can prove, a better right elsewhere.³ Indeed the second rule is merely an application of the first as both are intended to protect existing possession from disturbance.

17. Origin of the rule protecting possession.—The rule protecting possession is woven into the very structure of English law and is not affected by forms of action. Indeed, it is much older than the doctrine of ownership⁴ and the remedy given to owners to assert their title.⁵ We will see later that in the case of chattels the remedies of the early law were available only to the person who had possession and imparted this feature to the action of trespass⁶. It was after the action of ejectment became popular and superseded the real actions⁷ that courts developed the theory of 'absolute ownership' by holding that in an action of ejectment the plaintiff should prove a title not merely better than the defendant's but good against all the world.⁸ The policy of

1. *E.g.*, cf. *Asher v. Whitlock*, (1865) 1 Q.B. 1, with *Davison v. Gent*, (1857) 1 H. & N. 744; see also *Sundar v. Parbati*, (1899) I.L.R. 12 All. 55 (P.C.); *Sitaram v. Sadhu*, (1914) I.L.R. 38 Bom. 240; 16 Bom. L.R. 132; *Subbaiya v. Mahamad*, (1916) 32 M.L.J. 85; 40 I.C. 50; *Labh v. Singh Ahmed*, 1927 Lah. 11; *Chaturbuj Singh v. Sarada Charan Guha*, (1932) I.L.R. 11 Pat. 701.

2. The observations of Cockburn, C.J., in this case support this explanation and not any general application of the rule to all actions in ejectment. They were cited with approval in *Perry v. Glissold*, (1907) A.C. 73 by Lord Macnaghten. Their application to the facts of *Asher v. Whitlock* is, however, not quite clear. The facts were these. The last male owner had in 1842 encroached on some waste land in a manor, and died in 1860 leaving a will by which he devised it in favour of his widow and on her re-marriage, to his daughter. The widow remained in possession with the daughter, and in 1861 married the defendant, and all three resided in the property till 1863 when the daughter died. The plaintiff who was the heir-at-law of the daughter sued the defendant and was held entitled to recover. The defendant's plea that the last owner had no devisable interest was not accepted. The decision may be supported on the ground that the defendant was in possession as agent or bailiff of the daughter and could not deny her title; see Radcliffe, *Cases on Torts*, p. 282 (foot-note); 32 M.L.J. 85 above. See also on this point *Dixon v. Gayfer*, (1853) 17 Beav. 421.

3. P. & W., *Possession*, p. 92; Holdsworth, Vol. VII, p. 66; S.A. Wren, 41 L.Q.R. 145.

4. "The term 'owner' was first used in the year 1340, and 'owner-ship' in 1583"; Holdsworth, Vol. II, p. 78.

5. The old remedy of the writ of right determined only the better rights as between the parties; Maitland, *Equity*, p. 312; Holdsworth, Vol. III, p. 90.

6. See below, Chap. V, para. 14.

7. They were abolished by the Real Property Limitation Act, 1833 (3 & 4 Will. IV, c. 27, s. 36) but had long ago fallen into disuse.

8. *England d. Syburn v. Slade*, (1792) 4 T. R. 682 at p. 683; *Doe d. Wawn v. Horn*, (1838) 3 M. & W. 333; *Doe d. Goody v. Carter*, (1847) 9 Q.B. 863; *Doe d. Carter v. Barnard*, (1849) 13 Q.B. 945; see Holdsworth, Vol. VII, pp. 66, 79.

the law in protecting possession apart from ownership and occasionally even against ownership as in the case of the possessory interdicts of the Roman law has exercised the minds of jurists and philosophers.¹ The chief reasons for the protection of possession are (a) the maintenance of peace and order; 'any other rule would be an invitation to all the world to scramble for possession';² (b) the interests of personal security; 'the protection of possession of land and chattels is an extension of that protection which the law throws around the person';³ (c) the interests of owners; otherwise they would be put to the trouble and burden—not always light—of proving their title before getting back possession. The protection of wrongful possessors is only an unfortunate though unavoidable consequence of protecting rightful possessors.⁴ In other words possession is protected (a) as a branch of the criminal law, (b) as a branch of the law of tort, (c) as a branch of the law of property. In particular times and countries the interests of public peace would be more paramount than other speculative grounds of legal policy. While in mediaeval England the courts furnished remedies of the assize of novel disseisin and the writ of trespass to protect mere possession, the Indian legislature has in the nineteenth century gone further in the same direction by helping dispossessed persons to get back possession even from rightful owners by means of a suit under section 9 of the Specific Relief Act and of an application to a Magistrate under section 145 of the Criminal Procedure Code.⁵

18. Disturbance of possession.—We pass on to the second point to be proved by the plaintiff in an action of trespass, *viz.*, that his possession was disturbed by the defendant. In the old form of action, the usual allegation was that the defendant "broke into the plaintiff's close," *clausum fregit*. The disturbance of possession may be, (a) by entry of the defendant on the property, (b) by his remaining on it after any license or permission to remain was cancelled, (c) by any physical injury to the property or placing inanimate things on it, (d) by entry of the defendant's cattle on the property.

19. Entry of the defendant.—The entry of the defendant must be his voluntary act. An involuntary entry (*e.g.*, being carried against his will and without his neglect by a runaway horse) is not a trespass. But if it is voluntary, even an entry made by mistake is a trespass.⁶ The plaintiff need not prove that it was wilful or negligent, much less that

1. *E.g.*, Savigny, Kant, Holmes, Maitland; see Holdsworth, Vol. III, p. 95. The English rule is traceable to Germanic customs of ancient times.

2. *Per* Lord Kenyon in *Webb v. Fox*, (1797) 7 T.R. 391 at p. 397; Holmes, Common Law, p. 213; "Law, being a practical thing, must found itself on actual forces. It is quite enough, therefore, for the law that man, by an instinct which he shares with the domestic dog, and of which the seal gives a most striking example, will not allow himself to be dispossessed, either by force or fraud, of what he holds, without trying to get it back again."

3. *Per* Lord Denman in *Rogers v. Spence*, (1844) 13 M. & W. 571 at p. 581.

4. P. & M., Vol. II, pp. 41, 42.

5. See below, para. 55. The proceeding under s. 145 bears a very close resemblance to the possessory interdict known as *uti possidetis*, as to which see Hunter, History of Roman Law, p. 357.

6. *Basely v. Clarkson*, (1682) 3 Lev. 37; *Preston v. Mercer*, (1656) Hardres 60; see Radcliff, Cases on Torts, p. 223.

it was attended with any force, violence or damage. The words in the writ, *vi et armis* and *ad grave damnum* became long ago mere surplusage. Merely setting foot on another's property is in law a trespass.¹ In this respect the civil wrong differs from the offence of criminal trespass in which an intent to annoy, insult or intimidate is a necessary ingredient.² Civil trespass to property also differs from personal injury which is usually actionable only on proof of intent or negligence. The law may seem to have gone further in the protection of property than in that of the human person. The explanation is again historical.³ As many of the actions of trespass were really brought owing to the inconvenience of the real actions to establish disputed title, a mere entry or some such slight invasion of property was considered enough to found a cause of action, and the trespass was only a peg to hang the case upon. On the other hand the law as to personal injuries was not subject to any such historical accident. Street suggests that the above distinction rests also on practical grounds. He observes that "a man may well be expected to protect himself within certain limits from physical hurt, but there is often no other eye than that of the law to guard his lands."⁴ This may be so. Probably the law reflects also social opinion and sentiment in prohibiting even mistaken and unguarded intrusions into another's premises. In effect, the rule is not so hard or exceptional as it may appear, as every person is expected to know when he transgresses into another's boundary, and a trespasser if his act is not intentional is at least negligent. A person is also liable for the entry by his servant or agent acting under his express or implied authority.⁵ An attachment of property is a trespass but a mere order of attachment not followed by any interference with possession is not.⁶

20. Entry below the surface.—Entry below the surface would be a trespass, as where a person excavates mines or builds ⁷ under another's soil.

21. Entry above the surface.—The law regarding entry into airspace was not clear ⁸ but has been defined by statute in the case of flight by

1. The case of '*Thorns*' (1466) Y. B. 6 Ed. IV fo. 7, pl. 18 Kenny, Cases on Torts, p. 379 is an early and well-known authority on trespass. A person was held liable for going on his neighbour's land to remove the thorns which fell from his trees which he was cutting from his own land. For other well-known statements of the rule, see *Entick v. Carrington*, (1765) 19 St. Tr. at pp. 1029, 1065; *Ashby v. White*, (1702) 2 Ld. Ray, 938. See, however, Restatement, § 166.

2. S. 441, I. P. C.; see *Vullappa v. Bheema Rao*, (1917) I. L. R. 41 Mad. 156.

3. Holdsworth, Vol. VIII, p. 467; Holmes, Common Law, p. 97.

4. Foundations of Legal Liability, Vol. I, p. 24.

5. *Gregory v. Piper*, (1829) 9 B. & C. 591; *Joseph Rand, Ltd. v. Graig*, (1919) 1 Ch. 1.

6. *Mohammed Mustafa v. Mohammad*, 1940 Lah. 21.

7. *Willcox v. Kettell*, (1937) 1 A.E.R. 222.

8. *Pickering v. Rudd*, (1815) 4 Camp. 219, 221; *Fay v. Prentice*, (1845) 1 C. B. 828; *Kenyon v. Hart*, (1865) 6 B. & S. 249, 252; *Wandsworth Board of Works v. United Telephone Co.*, (1884) 13 Q.B.D. 904, 927. On this subject see McNair, Law of the Air, 1932 (Tagore Law Lectures, 1931).

aircraft. In 1919 it was agreed by the nations who were signatories to the International Convention of Paris¹ relating to Aerial Navigation that their aircraft should be at liberty to fly over the territories of one another. This Convention was given effect to in England by the Air Navigation Act, 1920,² and in India by the Indian Aircraft Act, 1934.³ These Acts declare that "no action shall lie for trespass or nuisance merely by reason of the flight of aircraft over any property at a height above the ground which having regard to wind, weather and all the circumstances of the case, is reasonable or by reason only of the ordinary incidents of such flight." This immunity is subject to the condition that the provisions of the Acts and any Order in Council or regulation made thereunder and of the Convention are duly complied with. Even apart from the above enactments, it is doubtful whether the mere flight of aircraft over another's land would be an actionable trespass. The maxim, *cujus est solum, ejus est usque ad coelum*,⁴ 'the owner of the soil is owner also of the whole column of space above the surface', cannot obviously be invoked to solve so essentially a modern problem.⁵ Dr. McNair has pointed out that apart from the maxim there is no warrant for the view that there can be any possession or ownership in a mere column of air-space as distinguished from air or other contents of that space.⁶ The maxim would however be applicable to the air-space within the height of buildings and capable of effective possession. Therefore an owner of land may use that space as he likes by building on it and can remove any projection into it like an overhanging tree, bough or cornice.⁷ But it is doubtful if these projections would *per se* be trespasses.⁸ In a Bombay case,⁹ the High Court held that a person whose eaves projected over the land of another for a period of twelve years did not acquire a right to maintain them by adverse possession, as the column of air occupied by the projection was not immovable property

1. Above, Chap. II, para. 9.

2. 10 & 11 Geo. 5, c. 80, s. 9. Above, Chap. II, para. 10.

3. Act XXII of 1934, s. 17.

4. Co. Litt. 4 (a); see *Corbett v. Hill*, (1870) L.R. 9 Eq. 671; *Ranchod Shamji v. Abdulla Bhai*, (1904) I.L.R. 28 Bom. 428; 6 Bom. L.R. 356.

5. Another such problem is illuminated sky-writing by aeroplanes for advertisement, which may be restrained as a nuisance; 173 L.T. p. 90.

6. Law of the Air, pp. 33, 34.

7. *Lemmon v. Webb*, (1895) A. C. 1; as to a cornice see *Kunj Behari v. Basdeo*, (1918) 47 I.C. 950 (Oudh); *Chhaganlal v. Hemchand*, 1932 Bom. 224; 34 Bom. L. R. 395 (eaves); *Dhuhayubhai v. Hirala*, 1936 Bom. 3; 37 Bom. L.R. 939. Such permanent structures are actionable without proof of damage unlike an overhanging tree; *Smith v. Giddy*, (1904) 2 K. B. 448. But both can be removed without proof of damage.

8. See, however, *Kamasubbier v. Shembagaratnam*, 1927 Mad. 357; *Kashi Bai v. Vallabhai*, (1922) I.L.R. 46 Bom. 827; 24 Bom. L.R. 305; *Ilan Raj v. Jagat Singh*, 1938 Lah. 208.

9. *Chhaganlal v. Hemchand*, above.

within the meaning of Art. 144 of the Limitation Act. The American Restatement has adopted the view that an entry into air-space over another's land is a trespass, though entry by aircraft for purposes of travel in a reasonable manner at a proper height and in accordance with regulations in force is privileged.¹ The privilege is lost and it is an actionable trespass if, for instance, aircraft is used for spying on or taking motion pictures of the activities of a person on the land. When a person makes a forced landing on or has to fly at a low altitude over another's land for self-protection, it is a trespass but excused on the ground of necessity.² If the trespass is accompanied by material damage to person or property, it would involve an absolute liability in England by reason of the statute aforesaid.³

22. Remaining on land after expiry of licence.—Remaining on another's land after the licence to remain is revoked is also a trespass though the entry was justified by the licence. But the continuance in possession or 'holding over,' as it is called, by a lessee after the expiry of the period of the lease will not be a trespass because unlike the licensee or invitee the lessee has the possession and not the lessor.⁴ When a person who had a limited right of entry exceeds that right, *e.g.*, uses the highway for some other purpose than passing over it, he is liable for a trespass.⁵

23. Physical injury or placing inanimate things on the land.—It is a trespass to cause physical injury to another's land or to place things on it.⁶ The injury must be direct. If it is indirect or consequential, it is not a trespass but may be a nuisance, *e.g.*, allowing water to escape into another's land from a drain⁷ or spout⁸ in one's own land, digging in one's land and causing a subsidence of another's,⁹ allowing one's trees to overhang a neighbour's land.¹⁰ The liability for trespass to land may be in theory absolute, but there is likely to be some element of wilfulness or want of care on the part of the trespasser. The liability may, however, be absolute under a rule of the common law like that in *Rylands v. Fletcher*¹¹, or under statute like the Air Navigation Act.¹² Finally it must be noted that trespass is a continuing wrong as long as the injury to the land continues or the thing placed on

1. §§ 159, 194. 2. § 197. 3. Above, Chap. II. para. 10.

4. 10 & 11 Geo. V, c. 80, s. 9; above, para. 12.

5. *Harrison v. Duke of Rutland*, (1893) 1 Q.B. 142; *Hickman v. Maisey*, (1900) 1 Q.B. 752.

6. *Gregory v. Piper*, (1829) 9 B. & C. 591; *Westripp v. Baldock*, (1938) 2 A.E.R. 779 (placing a ladder or plank against another's wall).

7. *Tenant v. Goldwain*, (1704) Ld. Raym, 1089.

8. *Reynolds v. Clarke*, (1725) 2 Ld. Raym. 1399.

9. Below, Chap. VI, para. 28.

10. *Smith v. Giddy*, (1904) 2 K.B. 48; cf. *Simpson v. Weber*, (1925) T.L.R. 302, where the defendant was held liable in trespass for allowing a creeper to grow and block the plaintiff's gutter.

11. Below, Chap. VI, para. 64.

12. Above, Chap. II, para. 10.

the land continues to be there. The following case is an illustration. The defendants who were a firm of builders and contractors engaged in pulling down the upper storeys of certain premises, omitted to remove the rubbish which thereby fell on the roof of an adjoining house. In course of time the rubbish got into a drain pipe in that house and by choking the gully caused the basement to be flooded during a heavy rain. The plaintiff was a tenant of the house who had entered into possession after the original act of trespass, *viz.*, lotting rubbish to fall on the house. It was held that he could sue the defendants for trespass and the consequential damage as the trespass was a continuing wrong.¹

24. Cattle-trespass.—In England the owner of cattle which stray into another's land has always been held liable for a trespass.² No damage need be proved and nominal damages may be awarded for the mere entry.³ But unlike the other categories of trespass the liability for cattle-trespass is absolute.⁴ In other words it is unnecessary for the plaintiff to prove intent or negligence, and it is not open to the defendant to prove its absence and escape liability. The rule as to cattle-trespass has had a great influence on the modern law. It served as the foundation of the doctrine of *Rylands v. Fletcher*⁵ and for that purpose has been assimilated to the category of nuisance. It comes of a very ancient stock of legal ideas, as special rules for compensation for damage to crops by straying cattle are found in ancient codes, like the Twelve Tables of Rome⁶ or the Code of Manu.⁷ The right to distrain cattle which do damage and to detain them till compensation is paid is still part of the law and is traceable to the primitive custom of noxal surrender.⁸

25. Defences to liability for cattle-trespass.—To this strict rule of liability for cattle-trespass, some defences or exceptions have been recognised. (a) Act of a third party. The owner of the cattle is not liable if a stranger lets them loose. If however this was due to his own negligence, he will be liable.⁹ (b) The plaintiff's breach of duty to fence his land. The

1. *Konskier v. Goodman*, (1928) 1 K.B. 421.

2. *Rylands v. Fletcher*, (1866) L.R. 1 Ex. 265, 280-284.

3. *Ellis v. Lofius Iron Co.*, (1874) L.R. 10 C.P. 10, 12.

4. *Rylands v. Fletcher*, (1866) L.R. 1 Ex. 265; Wigmore's article in *Selected Essays*, p. 73; Pollock, *Torts*, p. 514; but see Jeremiah Smith's article in *Selected Essays*, p. 209. In India this rule is confirmed by the Cattle Trespass Act, I of 1871, ss. 10 and 29. S. 26 makes the trespass of pigs even punishable apart from neglect. The rule has also been followed by the courts; *Madho v. Akaji*, (1912) 17 L.C. 899 (Nag.).

5. Below, Chap. VI, para. 64.

6. Table VIII, Clause 7; see Prichard and Nasmith, *History of Roman Law*, p. 93.

7. Chap. VIII, 240, 241.

8. Below, paras. 44 and 45.

9. *Mc Gibbon v. Mc Curry*, (1909) 43 Ir. L.T. 132.

duty may arise under statute, contract or prescription.¹ There is no general duty under the common law to fence one's land from another's and the absence of a fence in the plaintiff's land is ordinarily no excuse to the owner of straying cattle.² Nor can the latter rely on a contract between the plaintiff and a third party, *e.g.*, the plaintiff's landlord, with whom the plaintiff was under a covenant to fence the land.³ (c) That the plaintiff's land or premises adjoined a highway and the defendant's cattle were driven along the highway without any neglect on the part of the defendant or his servants.⁴ In such a case the defendant has also a right to go on the plaintiff's land for taking them back and is not liable for trespass if he does so.⁵ In *Gayler and Pope v. Davies & Son*,⁶ McCardie, J. observed that this rule is "just and convenient and agreeable to modern notions and everyday life", and that it rests on the principle that owners of property adjoining a spot on which the public have a right to carry on traffic take the risk of their property being injured by that traffic and cannot recover merely on the ground that the defendant was the owner of the vehicle or other thing which caused the injury and without proof that the injury was due to intent or negligence.⁷ In the particular case the defendant was held liable as there was negligence in leaving his carriage and horse unattended in a public street. Subject to such defences the owner of cattle is liable to the occupier of property on which they trespass.

26. Extent of liability for cattle-trespass.—The owner of the trespassing cattle is liable to pay damages for the mere trespass and also for any consequential damage, *e.g.*, damage to crops⁸ or infection of the plaintiff's sheep by the diseased sheep of the defendant's⁹, injury to the plaintiff's mare by the defendant's horse kicking or biting it.¹⁰ But

1. *Rooth v. Wilson*, (1817) 1 B. & Ald. 59; *Goodwyn v. Cheveley*, (1859) 4 H. & N. 631; *Singleton v. Williamson*, (1861) 7 II. & N. 410; as to cases where a person is sued for breach of a duty to fence and resulting damage, see *Lawrence v. Jenkins*, (1873) L.R. 8 Q.B. 274 (a prescriptive duty); as to a duty under statute, see Ry. Clauses Consolidation Act, 1845 98 & 9 Vict. c. 20; cf. *Fawcett v. Y. & N. Midland Ry. Co.*, (1851) 16 Q.B. 610; *Ricketts v. E. & W. India Docks Co.*, (1852) 12 C.B. 160; *Luscombe v. G. W. Ry. Co.*, (1899) 2 Q.B. 313; see, below, Chap. XVII, para. 4; as to duty under contract, see *Firth v. Bowling Iron Co.*, (1878) 3 C.P.D. 254.

2. *Devaston v. Payne*, (1795) Sm. L.C., Vol II, p. 160; 2 H. Bl. 527; *Boyle v. Tamlyn*, (1827) 6 B. & C. 329. 3. *Holgate v. Bleasard*, (1917) 1 K.B. 443.

4. *Tillet v. Ward*, (1832) 10 Q. B. D. 17; *Gayler and Pope v. Davies & Son*, (1924) 2 K.B. 75; *Madho v. Ahaji*, (1912) 17 I.C. 899 (Nag.)

5. *Goodwyn v. Cheveley*, (1859) 4 H. & N. 631; see also references to old precedents in support of this rule in the article of Wigmore, *Selected Essays on Torts*, pp. 74, 75.

6. (1924) 2 K.B. 75 at p. 83.

7. The learned Judge cited this principle from the judgment of Lord Blackburn in *River Wear Commissioner v. Adamson*, (1877) 2 A.C. 743, 767. See also a similar dictum of Lord Blackburn in *Rylands v. Fletcher*, (1866) L.R. 1 Ex. 265 at p. 286.

8. *Willaway v. Courtier*, (1918) 1 K.B. 200.

9. *Thayer v. Purnell*, (1918) 2 K.B. 333.

10. *Ellis v. Loftus Iron & Co.*, (1874) L.R. 10 C.P. 10.

injury to a man by the defendant's horse is not a natural consequence unless the defendant knows that his horse had a tendency to attack men.¹ When the element of trespass on land in the plaintiff's possession is wanting, a person complaining of injury to himself or to his animals by the defendant's cattle cannot recover merely on proof of the injury and without proof of the defendant's fault.² Thus while in *Ellis v. Loftus Iron Co.*³ the plaintiff recovered when the defendant's horse put its mouth across the fence and bit his mare, in *Manton v. Brocklebank*⁴ the plaintiff could not recover when his horse was kicked by the defendant's mare while both were grazing in the field of a third party.

27. Trespass of other animals besides cattle.—The above rule applies only to the trespass of cattle⁵ and not of other animals, *e.g.*, a dog⁶ or a cat.⁷ In the case of these animals, the plaintiff can recover only on proof of the defendant's fault, *viz.*, keeping them with knowledge of their mischievous tendency.⁸ But no action for their mere trespass will lie. In *Mason v. Keeling*,⁹ Holt, C. J. explained the distinction by the theory that trespass lay only in respect of animals in which a right of property existed in law.¹⁰ That this theory is incorrect is now generally accepted.¹¹ In *Buckle v. Holmes*¹² where the owner of a cat was held not liable for its straying into the plaintiff's premises and killing his pigeons and fowls, Bankes, L. J. stated the real explanation to be that the stricter

1. *Bradley v. Wallaces*, (1913) 3 K.B. 629.

2. *Cox v. Burbidge*, (1863) 13 C.B.N.S. 430; *Heath's Garage v. Hodges*, (1916) 2 K.B. 370.

3. (1874) L.R. 10 C.P. 10.

4. (1923) 2 K. B. 212; Salmond (Torts, p. 566) observes that this case seems inconsistent with *In re Polemis*, as to which see below, Chap. XIV, para. 64.

5. *I.e.*, horses, oxen, swine, poultry. There is no reported case of trespass of poultry. See *Hadwell v. Righton*, (1907) 2 K. B. 345 (owner of fowls held liable for injury to a person riding on cycle in a highway).

6. *Mason v. Keeling*, (1699) 12 Mod. 332; *Brown v. Giles*, (1823) 1 C. & P. 118; *Saunders v. Teape*, (1884) 51 L. T. N. S. 263.

7. *Buckle v. Holmes*, (1926) 2 K. B. 125.

8. *Read v. Edwards*, (1864) 17 C. B. N. S. 245 (a dog accustomed to chasing and destroying game).

9. (1699) 12 Mod. 332 at 335.

10. This appears to have been a passing invention of Holt and a compound of two different rules of the common law, *viz.*, first that there can be a larceny only of cattle, horses, poultry and other animals fit for food and not in respect of dogs, cats and other base animals not fit for food; 1 Hawk, P. C. Bk. I, c. 19, s. 43; Halsbury, Laws of England, Vol. I, p. 368; *Hannam v. Mockett*, (1824) 2 B. & C. 934; and second, the rule which prevailed on the strength of a similar rule in the Roman law that where animals in which a man has no property (*e.g.*, wild animals) escape from a man's custody, he is no longer liable for any injury they may cause; *May v. Burdett*, (1846) 9 Q. B. 101 at p. 113; Halsbury, Laws of England, Vol. I, p. 378.

11. *Per* Willes, J. in *Cox v. Burbidge*, (1863) 13 C. B. N. S. 430; Holdsworth, Vol. VIII, p. 470; Wigmore's article in *Selected Essays on Torts*, p. 75.

12. (1926) 2 K. B. 125 at p. 129.

rule in the case of cattle was due to their tendency to stray and eat crops unlike dogs and cats which are usually allowed to wander and are not kept shut up like cattle.

28. Trespass by a tenant-in-common.—As regards joint tenants or tenants-in-common, acts done by one of them in the usual course of enjoyment will not amount to a trespass.¹ But a co-tenant will be liable if his act amounts to (a) a total exclusion or ouster of the others²; (b) a destructive waste of the common property,³ e.g., pulling down a building.

29. Justifications.—We now proceed to deal with certain justifications⁴ which deserve special notice here, viz., (a) Authority of party, (b) Authority of law.

30. Authority of party.—It may be by (i) grant or (ii) leave and licence.

31. Grant.—The grant may be of the absolute right under a sale or gift, or of a smaller right under a mortgage or lease, or of an easement or other servitude like a right of way or right to catch fish or to cut trees or grass or to shoot game. In India a transfer of any interest in immovable property can be made only by a registered document where its value is above Rs. 100. The defendant may plead a grant by the plaintiff himself or he may plead one from the real owner.

32. Leave and licence.—It may be from the plaintiff himself or from the real owner. In the latter case the defendant must prove the ownership of the licensor and the authority from him.⁵ The law with regard to licences has been laid down in a number of decisions in England and has been enacted substantially in the same form in India by the Indian Easements Act.⁶ A licence may be express as in the case of a guest in a house or a person who has purchased a ticket to attend a cinema. It may be implied from the conduct of the grantor, as where a person is habitually allowed to use another's land as a shortcut. The essence of a licence is first, that it is personal to the parties and cannot be assigned. But unless a

1. *Watson & Co. v. Ramchand*, (1890) I.L.R. 18 Cal. 19 (P. C.): 17 I. A. 110; *Ravi Singh v. Radhu Singh*, (1934) I.L.R. 15 Lah. 708.

2. *Jacobs v. Seward*, (1872) I.L.R. 5 ILL. 464; see also *Murray Ash and Kennedy v. Hall*, (1849) 7 C. B. 441; *Bularam v. Syama*, (1920) 24 C.W.N. 1057; 60 I.C. 298; *Currimbhoy v. Creet*, (1929) I.L.R. 57 Cal. 170, 195.

3. See previous note. For cases of a co-owner building on common land, *Sheo Pershad v. Leelah*, (1873) 20 W. R. 160; *Shadi v. Anup*, (1889) I.L.R. 12 All. 436; *Kanakayya v. Narasimhulu*, (1895) I L. R. 19 Mad. 38; *Hemants v. Baranagore*, (1914) 19 C. W. N. 442; 24 I. C. 313; *Mohanchand v. Isakbhai*, (1906) I. L. R. 25 Bom. 248; 2 Bom. L. R. 898 (a co-tenant laying a drain is not ouster or waste).

4. For a detailed and interesting enumeration, see Restatement §167, *et seq.*

5. *Chambers v. Donaldson*, (1809) 11 East 65. 6. Ss. 52-64.

different intention is expressed or necessarily implied, a licence to attend a place of public entertainment may be transferred by the licensee.¹ Secondly, a licence is revocable by the licensor. But it cannot be revoked if (a) it is coupled with a transfer of property and such transfer is in force, (b) the licensee, acting upon the licence, has executed a work of a permanent character and incurred expenses in the execution.² Thus the transfer of a right to cut trees or to shoot game on a land involves the accessory licence of going on it, and therefore it cannot be revoked. If a licence is validly revoked, the licensee's continuance on the premises is no longer lawful and he becomes a trespasser from that moment or after such reasonable time as is necessary for him to quit the place.³ Like any other trespasser he can be ejected if he refuses to quit. He may be able to sue the licensor for breach of contract,⁴ but cannot sue a stranger for disturbance of his use of the property under the licence.⁵ A question of some nicety and difficulty has arisen as to the rights of a person who has purchased a ticket to attend a public entertainment like a race meeting or a cinema. Can he be evicted by the licensor before the meeting or the performance is over, and if evicted by force, can he sue the licensor for assault and battery? In *Wood v. Leadbitter*⁶ it was held that he could not. In *Hurst v. Picture Theatres, Limited*,⁷ it was held that he could. The two decisions are directly in conflict and the former is considered to be no longer law. In the earlier case, Baron Alderson held that the plaintiff, the ticket-holder, was only a bare licensee and had no interest in immovable property as it could be acquired only by deed. The later case proceeds, however, on the following reasoning. As the plaintiff had purchased the right to attend the performance to its end, the licence to go into the building and remain there for that purpose was accessory to that right and was, therefore, really a licence coupled with a grant. Even if the grant required the formality of a deed under seal, the rights of the grantee would be protected in equity by means of an injunction restraining the grantor from ejecting the grantee in violation of the contract. No doubt, before 1875, a court of common law like the one which decided *Wood v. Leadbitter* could not grant relief on that basis and could only direct the licensee to a court of equity. But in 1875 courts of law and equity were merged in the same court. Therefore the court of King's Bench which decided *Hurst's case* in 1915, could, by the grant of an injunction, maintain the licensee in possession, and regard any force used by the grantor to evict him as illegal and actionable. There is no reason why *Hurst's case* should not be followed in India.

1. S. 56. 2. S. 60. 3. *Hyde v. Graham*, (1862) 1. H. & C. 593.

4. *King v. David Allen & Sons*, (1916) 2 A. C. 54.

5. *Hill v. Tupper*, (1863) 2 H. & C. 121.

6. (1845) 13 M. & W. 838.

7. (1915) 1 K.B. 1. An Australian case has dissented; 53 L.Q.R. 313; 54 L.Q.R. 319. See Hanbury, Equity, pp. 117-9.

33. Authority of law.—It may arise for the purpose of exercising the rights discussed in the following six instances.

34. Re-entry by the owner.—An owner may re-enter on his land¹ and if he does so peaceably cannot be sued for trespass. As he acquires by entry the lawful possession of it, he may maintain trespass against any person who wrongfully remains there. He can also expel the latter by force if necessary. Where his re-entry is attended with force somewhat different considerations arise owing to the statutes against forcible entry² in England. These statutes were passed in the Middle Ages to avoid breaches of the peace³ and one of them, a statute of Richard II⁴ has survived to this day and is still part of the law of England. It has been understood to prohibit re-entry even by owners if attended with violence or a breach of the peace.⁵ But the further question is whether, assuming that the owner gets possession by a forcible entry punishable under the statute, he can also be sued by the person ejected in a civil action for damages. The question has raised a difference of opinion in the past but may now be taken to be settled by the decision of the Court of Appeal in *Hemmings v. Stoke Poges Golf Club*.⁶ This case decided that where the owner uses only the necessary amount of force to re-enter he is not liable in damages for trespass or for assault and battery though he may be liable to be prosecuted under the statute. It would be otherwise if he uses more force than is necessary. In India there is no corresponding statute, and an owner entering by force cannot be sued for trespass.⁷ If he uses excessive force or commits a breach of the peace he may lose the right of private defence and be liable to punishment under the Indian Penal Code.⁸ He will also be liable in a suit under section 9 of the Specific Relief Act to restore the property to the person ejected by him whether with moderate or excessive force.⁹

1. Re-entry can be made only with leave of court during the present war by reason of the Courts (Emergency Powers) Act, 1939, s. 1.

2. (1381) 5 Rich. II, c. 7; (1391) 15 Rich. II, c. 2; (1429) 8 Henry VI, c. 9.

3. Holdsworth, Vol. III, p. 280; P. & M., Vol. II, p. 49.

4. Rich. II, c. 7. For its terms, see *Hemmings v. Stoke Poges Golf Club*, (1920) 1 K.B. 720.

5. *Hemmings v. Stoke Poges Golf Club*, (1920) 1 K.B. 720. The plaintiff on leaving his employment in a Golf Club refused to vacate a cottage of the club and he and his wife were gently taken out by the defendant's agent. The decision can also be supported on the ground that the servant was only in permissive occupation and could be expelled by force when his license was revoked; above, para. 8.

6. Above. It is now unnecessary to discuss the prior cases like *Newton v. Harland*, (1840) 1 Man. & G. 644; *Beddall v. Maitland*, (1881) 17 Ch. D. 174, 180; *Edwick v. Hawkes*, (1881) 18 Ch. D. 199.

7. *E. v. Bandhu*, (1927) I.L.R. 6 Pat. 794.

8. S. 103.

9. See, however, the observations of Mullick, A.C.J. *contra* in *E. v. Bandhu*, (1927) I.L.R. 6 Pat. at p. 799.

35. Re-taking of chattels.—The defendant may justify an entry upon the plaintiff's land to recover his goods when (i) they have been wrongfully taken and placed there by the plaintiff¹; he cannot, however do so, if the plaintiff whose possession of the goods was originally lawful detained them wrongfully, *e.g.*, a bailee after the bailment has determined;² (ii) they have been placed there in pursuance of the felonious act of a third person³; (iii) they got there by accident, *e.g.*, an act of God⁴; but he cannot justify an entry if it cannot be shown how they got there.⁵ He has the right to use reasonable force to enter and take back the goods,⁶ but violence or a breach of the peace would be unlawful.⁷ It is needless to add that a person has no right to enter upon another's premises to recover chattels that have got there by his own wrongful act.⁸ Where a person lawfully drives cattle along a highway and some of them stray into adjoining land not fenced off from the way he can follow them and drive them out and is entitled to some reasonable time for doing so before they can be distrained by the occupier.⁹ But a person has no right to go over another's land for pursuing game or bees¹⁰ or fox-hunting.¹¹

36. Abatement of nuisance.—The law confers a right on an occupier of land to enter upon another's premises for abating a nuisance upon them, *e.g.*, removing the filth on them.¹² But he must previously give notice to the occupier to abate the nuisance unless the case is one of emergency.¹³ If he can abate the nuisance from on his own land, notice is not necessary, *e.g.*, cutting overhanging branches of the neighbour's trees.¹⁴ In

1. *Patrick v. Colerick*, (1838) 3 M. & W. 483.

2. Y. B. 9, Edw. IV, 35 pl. 10 cited in Clerk and Lindsell, *Torts*, p. 417; as to right of a tenant who has quitted the premises to go back for taking an article of his, see *Wilde v. Waters*, (1855) 16 C.B. 637.

3. Blackstone, iii, p. 4.

4. *Nicholson v. Chapman*, (1793) 2 H. Bl. 254; 3 R.R. 374; *The case of 'Thorns'* below, note 9. Cf. *Sakat Mal v. Abdul Aziz*, (1920) 19 A.L.J. 309; 1921 All. 90.

5. *Anthony v. Hunev*, (1832) 8 Bing. 186.

6. *Blades v. Higgs*, (1861) 10 C.B. (N.S.) 713; see L.Q.R. Vol. 28, p. 262.

7. Blackstone, iii, p. 4.

8. *The case of 'Thorns'* (1466) 6 Ed. IV, 7, pl. 18; see Holmes, *Common Law*, p. 103; Street, Vol. I, p. 76; Winfield, *Tort*, pp. 392 and 393.

9. *Goodwyn v. Chevely*, (1859) 4 H. & N. 631.

10. *Kearry v. Pattinson*, (1939) 1 K.B. 471 C.A.

11. *Paul v. Summerhayes*, (1878) 4 Q.B.D. 9. The destruction of noxious animals is no justification.

12. *Earl of Lonsdale v. Nelson*, (1823) 2 B. & C. 302; *Jones v. Williams*, (1843) 11 M. & W. 176.

13. *Lemmon v. Webb*, (1895) A.C. 1.

14. *Lemmon v. Webb*, (1895) A.C. 1; *Krishna v. Shankar*, (1894) I.L.R. 19 Bom. 420; *Deo Punt v. Kaulshar*, (1915) 28 I.C. 843 (All); *Vishnu v. Vasudeo*, (1918) I.L.R. 43 Bom. 164; 20 Bom. L.R. 826; *Bhudeb v. Kalachand*, 1921 Cal. 129; 34 C.L.J. 315; cf. *Someshwar v. Chunilal*, (1920) I.L.R. 44 Bom. 605; 22 Bom. L.R. 790 (where the right was denied as the tree was 50 years old and there was apparently a prescriptive right to keep it). But to take the fruits of an overhanging tree is unlawful conversion; *Mill v. Brooker*, (1919) 1 K.B. 555.

India the right to abate a nuisance is subject to the limitation that a disturbance of an easement cannot be abated.¹ The entry on land for this purpose cannot in any case be made by force.

37. Execution of legal process.—Persons who execute legal processes like a warrant of arrest, attachment or search are protected by the warrant from liability in respect of the acts authorised by it.² But they can claim this immunity only if (a) the warrant or order is not illegal or irregular on the face of it;³ (b) they conform to its terms; for instance, if a bailiff arrests the wrong man or attaches the wrong property, he cannot plead a *bona fide* or even unavoidable mistake as his justification;⁴ (c) they conform to the mode or procedure prescribed by law in that behalf.⁵ In an old case known as the *Semayne's case*,⁶ the judges made the famous observation that "every man's house was to him as his castle and fortress as well for his defence against injury and violence as for his repose"; and held that the sheriff could not break open the outer door in execution of process obtained by a private party as distinguished from the Crown, against the person in occupation or his goods. The rules on this subject are now defined by statute, e.g., in India by the Civil⁷ and Criminal⁸ Procedure Codes.

38. Authority incident to the apprehension of criminals and the prevention of crime.—In England a police-officer may enter premises without a warrant to arrest to prevent a felony or breach of the peace.⁹ In *Thomas v. Sawkins*,¹⁰ it was held that this right arises not only when a breach of the peace or affray is being committed but also when one is expected to be committed. In that case certain police-officers had entered a private hall where a public meeting to protest against a Sedition Bill had been advertised. On being asked by the convener to quit they refused on the ground that they from their experience of communist meetings considered

1. Indian Easements Act, s. 36.

2. Judicial Officers' Protection Act, XVIII of 1850; *Sevalram v. Abdul Majid* L.L.R. (1938) 1 Cal. 581; 1938 Cal. 177.

3. *Mayor of London v. Cox*, (1867) L. R. 2 H.L., at p. 269; see above, Chap. II, para. 19.

4. *Glasspoole v. Young*, (1829) 9 B. & C. 693; *Garland v. Carlisle*, (1837) 4 Cl. & F. 693; *Srinivasayya v. Lakshmayya*, 1937 Mad. 811. If the decree-holder or other person is also responsible, e.g., by pointing out the wrong person, he will also be liable in trespass; *Morris v. Salberg*, (1889) 22 Q.B.D. 614.

5. *Mt. Chabai v. Mt. Chumabai*, 1935 Nag. 237. See also *Sevalram v. Abdul Majid* above.

6. (1604) 5 Co. Rep. 91 a; Sm. L.C., Vol. I, p. 104.

7. Ss. 55, 62, C.P.C.; cf. s. 271 of the C.P.C. of 1877; *Baikunwar v. Venidas*, (1871) 8 Bom. H.C. (A.C.J.) 127; *Sodamini Dasi v. Jagaswar*, (1871) 5 B.L.R. 27; *Domadar v. Ishwar*, (1878) 3 Bom. 89.

8. S. 48, Cr. P. Code.

9. Halsbury, Vol. 25, p. 327. Below, Chap. XVIII, para. 10.

10. (1935) 2 K.B. 249. See also *Duncan v. Jones*, (1936) 1 K.B. 218 (a police-officer can prevent a public meeting in a highway).

it necessary to stay and prevent seditious speeches being delivered and breaches of the peace occurring. This decision has been criticised in the Annual Survey of English Law¹ as making a serious inroad on civil liberties. Where a police-officer is not acting under any such powers and has no warrant² to enter premises he is only a trespasser. In *Davis v. Lisle*³ a police-officer believing that a person's servants had committed the offence of obstructing a highway with a lorry entered his garage to make enquiries. It was held that the officer had no right to remain after he was asked to quit and was a trespasser. In India the powers of a police-officer to enter premises without a warrant are defined by the Criminal Procedure Code.⁴

39. Distress.—The right of distress or distraint is the right to take without legal process chattels out of the possession of another for obtaining satisfaction of a debt or wrong. It is therefore a mode of self-help or extra-judicial redress available to the aggrieved party. One form of it is distress damage feasant which will be discussed later. We are here concerned with the right to distrain another's goods and for that purpose to enter on his land or premises, which can be pleaded as a justification in an action of trespass. In England distress is a very ancient right which landlords exercised for realising their dues from defaulting tenants. It still survives as a part of the customary law of real property.⁵ But it enabled the landlord only to distrain and keep the chattels as a pledge. Usually in olden times he would seize the cattle and impound them, *i.e.*, send them to the village pound. But he could do no more to realise his dues. If an obstinate debtor allowed his cattle to remain in the pound, the creditor did not benefit by the distraint. 'With commendable stubbornness the common law refused to make the remedy legally effective.'⁶ It was by means of legislation⁷ that the distrainer got the power of sale but on condition of strict compliance with the formalities provided in the interests of the tenant. Thus what was once a purely private form of self-help⁸ has been, on the one hand, made more effective by legislation and, on the other, rendered safe by being harnessed to legal machinery, so that the landlord now occupies more or

1. (1935) p. 73; (1936) p. 72. 2. Above, para. 37. 3. (1936) 2 K.B. 434.

4. Ss. 149 & 151. As they assume either the actual commission of a cognisable offence or a design to commit one, it would seem that on the facts in *Thomas v. Sawkins*, the decision should be otherwise in India. For other powers, see ss. 153, 165. "So an Englishman's garage is his castle as long as he does not hold a public meeting therein"; Annual Survey, (1936) p. 73.

5. It can be created also by deed as in the case of a rent charge; see 4 Geo. II, c. 28, s. 5. 6. Street, Vol. III, pp. 293, 294. 7. 2 Will. & Mary, c. 5.

8. This right was recognised by all ancient laws and in the early Roman law was known as *pignoris capio*; see Hunter, History of Roman Law, p. 1044; as to its past history, see P. & M., Vol. II, p. 573; Holdsworth, Vol. III, p. 281; Street, Vol. III, Chap. XX-XXIII.

less the position of an agent of the law to execute its legal process. In India zamindars and other landholders have a customary right to attach the holding and movables of the ryots for arrears of rent. This is now governed by statute-law in various provinces¹. The Government and public bodies like local boards and municipalities have under various enactments the power to distrain the property of persons who have defaulted to pay arrears of land revenue² or other public dues.³ The persons who exercise the right of distress will have to conform to the provisions of the statute under which they purport to act.⁴

40. Trespass 'ab initio'.—There is one important difference between a licence given by a party and a licence or authority conferred by law. In the latter case, but not in the former, the person who enters land or premises and afterwards commits some unlawful act like theft becomes a trespasser *ab initio* by reason of the abuse of legal authority. But such abuse must take the form of a positive act of malfeasance and not a mere omission or nonfeasance. The leading authority is the old case known as the *Six Carpenters' case*.⁵ Six carpenters entered the plaintiff's tavern and asked for wine and drank it but refused to pay for it. It was held that their refusal to pay would not make them trespassers. If on the other hand they had stolen or carried away any article in the inn, they would have been regarded as trespassers from the moment of entry, because the law presumes from the subsequent act that the original entry itself was with an unlawful intent. This principle applies not merely to entry on immovable property but to all cases for which trespass lay under the old procedure. A person who distrains goods for rent, executes a warrant of arrest or attachment or seizes cattle in exercise of the right of distress damage feasant would be liable for the original seizure itself if he destroyed the goods, assaulted the person arrested, or killed the cattle. Thus the law tried at an early time to impose a special and stringent liability on persons who wilfully abused its authority. It had need to do so in the case of distress of goods by landlords which being a form of self-help was in early law hedged round with regulations of a punitive character. Similarly the law was severe in its rules regarding abuse of public authority by sheriffs, bailiffs and other officers of the law. From these cases the principle was generalized and extended to all cases of abuse of public authority to enter on property or seize chattels.⁶ To such cases, the action of trespass with its stringent processes was extended by means which were

1. The Estate Land Act in Madras, the Tenancy Acts in Bengal, United Provinces, etc.

2. *E.g.*, Madras Revenue Recovery Act (II of 1864).

3. *E.g.*, the Local Boards Acts, the Municipalities Acts.

4. *E.g.*, ss. 84, 85 and 212 of the Madras Estates Land Act.

5. (1610) 8 Co. Rep. 146 a; Sm. L.C., Vol. I, p. 134.

6. Holdsworth, Vol. VII, pp. 498-501.

characteristic of the mediaeval common law, *viz.*, a legal fiction, in this case a fiction of retrospective intent. Such a fiction was probably required, because unless the original taking was regarded as a trespass, the subsequent illegal act committed, say, by a landlord who had distrained goods of his tenant and damaged them, could not be complained of as a trespass as the tenant had no possession of them at the time the damage was caused.¹ At a later time, especially after trover had become an efficient remedy for wrongful acts with reference to goods, the rule became less indispensable.² But like other rules in the law, it was formulated in such a way that new limitations foreign to its origin were engrafted on it. As the liability was said to be due to a trespassory intent inferred from the later unlawful act, it could not arise merely by an omission or non-feasance but only by some positively wrongful act like a trespass.³ The doctrine of trespass *ab initio* was another instance of the extension of the remedy of trespass to cases in which an important principle of public policy demanded it. But at the present day there is no longer any need to retain this rule.⁴ Courts can now visit abuses of legal authority with deserving damages without its aid. It was found to bear very hard on landlords, and was abrogated in their case by the Distress for Rent Act, 1737,⁵ which provided that parties aggrieved by any irregularity could sue for the special damage sustained thereby and not for a trespass *ab initio*. In England⁶ and in India⁷ distress for rent and rates is regulated by statute law whose provisions will govern remedies for illegal acts. The occasions for invoking the old rule are therefore rare.⁸ When they arise, there is no disposition unduly to extend its operation. Thus where a landlord in levying a lawful distress seized also goods which were exempt from distraint,⁹ or a police-officer while effecting a lawful arrest seized from the possession of the arrested person documents some of which he had no right

1. Holdsworth, Vol. III, p. 233; Street, Vol. III, p. 243.

2. See, e.g., *Shortland v. Gouett*, (1826) 5 B. & C. 486; *West v. Nibbs*, (1847) 4 C. B. 172.

3. It is not easy to reconcile the cases or the dicta regarding the use of these terms 'non-feasance' and 'malfeasance' in this context; cf. *West v. Nibbs*, (1847) 4 C. B. 172 (detention of goods by a landlord after tender not a trespass); *Ash v. Dawson*, (1852) 8 Ex. 237 (sheriff remaining on premises for an unreasonably long time is a trespass); *Lee v. Dangar*, (1892) 2 Q.B. 337; *Brajendra v. Luffman*, (1908) 13 C.W.N. 485; 4 I.C. 520, (assault by a police-officer during search, not a trespass *ab initio*); *Smith v. Egginton*, (1837) A. & E. 167 (sheriff not a trespasser for detaining a prisoner for more than 30 days contrary to statute.).

4. Salmond, Torts, p. 218.

5. 11 Geo. II, c. 19, ss. 19 & 20. But this does not apply where the distress is wholly unlawful. *Attack v. Bramwell*, (1863) 3 R. & S. 520; *Grunnell v. Welch*, (1905) 2 K.B. 650.

6. 42 & 43 Vict., c. 49; 51 & 52 Vict., c. 21.

7. Above, para. 39, f. n. 8.

8. *Brajendra v. Luffman*, above. It still applies to distress damage feasant; *Oxley v. Watts*, (1785) 1 T. R. 12.

9. *Harvey v. Pocock*, (1843) 11 M. & W. 740.

to seize,¹ it was held that there would be a trespass only in respect of the excessive exercise of the power and not the whole operation of distraint or arrest and seizure.

41. Remedies.—They may be extra-judicial or judicial. The former are three in number: (a) expulsion of the trespasser, (b) re-entry, (c) distress damage feasant.

42. Expulsion of the trespasser.—It may be forcible but the force used must be reasonable and appropriate to the occasion. For instance one cannot lay a trap or a spring-gun to punish a trespasser.² The trespasser should be asked and given a reasonable opportunity to depart before force is used to expel him.³ But notice is unnecessary when the trespasser uses force to enter, *e.g.*, a house-breaker. Injury to life or limb could hardly be deemed necessary for forcible expulsion from property except as a measure of defence of the person also.⁴

43. Re-entry.—A person who is dispossessed from his property may re-enter if he can do so without force. Forcible re-entry is made an offence by statute in England. The statute cannot be evaded by the device of appearing to enter upon a portion of the property, say, the border, peaceably and then using force to eject the trespasser.⁵ Forcible expulsion is a remedy only for one who has effective possession of the premises whether he is the true owner or not.

44. Distress damage feasant.—This is an ancient form of extra-judicial redress. The phrase means the distraint of things doing damage. This right can be exercised by an occupier of land with reference to cattle or other things which go on his land and cause damage there. He can distrain and keep them as security or pledge for payment of compensation for the injury done by them. The distraint is usually of cattle but is not confined to them and extends to all chattels, animate and inanimate. In one case, a railway company was held entitled to seize and detain a locomotive engine of another company which was wrongfully encumbering its lines.⁶ In the case of cattle the distrainer may keep them on his own premises or send them to the village-pound.⁷ "There is no more ancient

1. *Elias v. Pasmore and others*, (1934) 2 K.B. 164; see also *Canadian Pacific Wine Co. v. Tuley*, (1921) 2 A. C. 417. For a neat statement of the rule, see Restatement §§ 214, 215.

2. *Bird v. Holbrook*, (1828) 4 Bing. 628; 7 & 8 Geo. IV, c. 18; 24 & 25 Vict. c. 100, s. 31.

3. *Kumud v. Bignold*, 1923 Cal. 306 (gently pushing trespasser without ordering him to go out, nominal damages allowed).

4. See, *e.g.*, *Collins v. Renison*, (1754) 1 Sayer 138; *Kinsella v. Hamilton*, (1890) 26 L. R. Ir. 671.

5. *Edwick v. Hawkes*, (1881) 18 Ch. D. 199.

6. *Ambergate Ry. Co. v. Midland Ry. Co.*, (1853) 2 E. & B. 793.

7. As to actions for rescue and pound-breach, below, Chap. V, para. 22.

institution in the country than the Village-Pound. It is far older than the King's Bench and probably older than the Kingdom."¹ It has been transplanted in this country by the Cattle-trespass Act, 1871² and is seen in almost every village or town. The Cattle-trespass Act enables persons, on whose land cattle trespass, to take them to the pound. The owner of the cattle can take them back from the pound-keeper on payment of a small fine but is not bound to pay any compensation to the owner of the land. This Act was apparently intended to take away the right of distress though it does not do so in express terms³. In England the rules regarding the exercise of the right⁴ are well-settled by case-law. Some of them are the following:—

(a) There must be an actionable trespass by cattle. If, for instance, they strayed into land while being driven lawfully on a highway they cannot be distrained unless they were there longer than it was reasonably necessary to take them out.⁵ If again the trespass was due to the breach of duty on the part of the owner of the land to keep fences, he cannot distrain them. (b) The animal or animals seized should have caused actual damage either to person or property on the land.⁶ (c) The seizure must be on the land itself and not outside it.⁷ (d) There can be no distraint of cattle while they are in the lawful custody of any person, e.g., a horse which another is riding. This is to avoid breaches of the peace.⁸ (e) There is no right of sale but merely a right to detain until payment of compensation.⁹ We have seen that distress for rent also could not ripen into a sale until legislation allowed it. (f) A statute directs that the distrainer should provide animals distrained with food and water.¹⁰ (g) He cannot sue for trespass as long as he is detaining them. But his right of action revives if they perish or are lost without any fault of his.¹¹ (h) The owner of the cattle can take them back on payment of compensation, but if there is any dispute regarding the legality of the seizure or the amount of compensation his course is to bring an action of replevin by which he can get back the cattle immediately subject to the dispute being settled by the decree in the action.¹²

45. History of the right of distress damage feasant.—The right of seizure of cattle and even of inanimate things doing damage, and its corollary, the liability of their owner to pay compensation belong to a very ancient family of ideas and are traceable

1. Maine, *Early History of Institutions*, p. 263.

2. Act I of 1871.

3. Ss. 20 & 29 seem impliedly to do so.

4. By reason of the Courts (Emergency Powers) Acts (S. 1 (2) (a) (i) of the Act, of 1939 and the Consolidation Acts, 1943 this, like any other form of distress, is not available during the war without the leave of the Court; *Watkinson v. Hollington*, (1943) 2 A.E.R. 74.

5. *Goodwyn v. Cheveley*, (1859) 4 H. & N. 631; *Tillet v. Ward*, (1882) 10 Q.B.D. 17.

6. *Boden v. Roscoe*, (1894) 1 Q.B. 608 (damage by the owner's filly on his land being kicked by a pony).

7. *Vaspor v. Edwards*, (1701) 12 Mod. 658; cf. *Jagannath v. R.*, 1934 Nag. 258.

8. *Storey v. Robinson*, (1795) 6 T.R. 138; *Field v. Adames*, (1840) 12 A. & E. 649.

9. *Collins v. Hoare*, (1936) 82 L.J. 347, 423.

10. Protection of Animals Act, 1911, 1 and 2 Geo. V, c., 27, s. 7.

11. *Vaspor v. Edwards*, above.

12. County Courts Rules, O. 34, rr. 4, 5, 6; *Gibbs v. Cruikshank*, (1873) L. R. 8 C.P. 454; *Smith v. Enright*, (1893) 63 L.J.Q.B. 220; 69 L.T. 724.

to the primitive custom which prevailed throughout Europe of demanding the surrender of the thing which did damage or, in the alternative, compensation from its owner.¹ The surrender was enforced whether the offending thing was a slave or an animal or even an inanimate thing. If death was caused by another's slave, beast or sword, the slave or beast was put to death, and the sword had to be delivered up as it was forfeited to God or *deodand*.² These practices had their roots in primitive instincts of vengeance and superstition.³ The seizure of cattle doing damage belongs in origin to this stratum of legal evolution, and in a later age when the value of cattle had risen and made them worth keeping, took its modern form of a lien for recovery of compensation. In that form it survives in the modern law on account of its utility while the older practices like noxal surrender and *deodand* disappeared with the conditions that produced them.

46. Judicial remedies.—They are (i) Damages, (ii) Recovery of possession, (iii) Declaration of title and (iv) Injunction.

47. Damages for mere entry without leave.—Nominal damages would ordinarily be awarded; in England the usual figure is 40 s. besides the costs of the action. This is the rule when the action is intended to settle a disputed right, or the plaintiff's conduct in going to court is not open to disapproval. But if the trespass is trifling and the action is frivolous, the court would penalise the plaintiff by awarding contemptuous damages, and refusing costs.⁴ Where there are aggravating circumstances, exemplary damages may be awarded; e.g., a trespasser wantonly persisted in after opposition and accompanied by gross insult or physical injury, invasion of personal liberty or a wilful abuse of legal authority.* A *bona fide* claim of title will on the other hand be a mitigating

1. P. & M., Vol. II, p. 470; Wigmore, Anglo-American Essays on Legal History II, p. 474.

2. As to *deodand*, see Holmes, Common Law, pp. 7, 24; Holdsworth, Vol. II, 46, 47. An American writer, G.M. Gest, suggests that the extension of the principle of *deodand* to motor-cars causing fatal accidents would be a valuable measure of prevention; G.M. Gest, "Lawyer and Literature," p. 212.

3. The *deodand* was in origin an illustration of "that unreasoning instinct that impels the civilised man to kick, or consign to eternal perdition, the chair over which he has stumbled"; P. & M., Vol. II, p. 474.

4. They are now entirely in the courts' discretion in England and in India. Formerly there were statutes in England which provided that when less than 40 s. were recovered, costs should not be allowed except on a judge's certificate that the action was to try a right or that the trespass was wilful or malicious; e.g., 3 & 4 Vict. c. 24; see the judgment of Lord Blackburn in *Garrett v. Bradley*, (1878) 3 A.C. 944, 963. The earliest was the Statute of Gloucester, (1278); Street, Vol. III, p. 233. The practice of putting up notices warning trespassers was intended to secure costs as a trespass after notice was held 'wilful'. But the usual notice that trespassers will be prosecuted is only a 'wooden falsehood,' as a trespass without an intent to insult or annoy is not criminal. Pollock, Torts, p. 317. These statutes have been repealed.

5. *Merest v. Harvey*, (1814) 5 Taunt 442 (the defendant, a person of rank, entered the plaintiff's premises in a drunken condition and behaved insolently and shot his game, plaintiff awarded £ 500); see also *Whitham v. Kershaw*, (1885) 16 Q. B. D. 613, 618; *Bracegirdle v. Orford*, (1813) 2 M. & S. 77, cited by Lord Collins in *Addis v. Gramophone Co., Ltd.*, (1909) A.C. 488, 501; *Ramaswami v. Suppia*, (1935) 69 M.L.J. 98: 1935 Mad. 699,

circumstance.¹ Where a person profits by the wrongful entry into, and use of another's property, it may be reasonable to measure the damage to the plaintiff by the value of the benefit derived by the defendant. Thus if the defendant stealthily occupied a vacant house of the plaintiff's the latter cannot be in a worse position than if he allowed the defendant to occupy it by permission or sufferance, and he can recover a reasonable rent for the occupation as damages.² But any benefit casually or indirectly obtained by the wrongdoer, *e.g.*, saving of cart hire by his taking a cross-cut on another's land will not be a reasonable compensation. Where a person uses without leave underground ways in another's property for carrying coal from his own mines, it has been held that he is liable to pay a reasonable rent for the 'wayleave' on the principle that a person should not be allowed to profit by his own wrong.³ The principle was also applied in a case of user above ground where the defendant tipped refuse from his mines on the plaintiff's property.⁴ Besides damages for trespass the plaintiff can recover compensation also for special damage. But such damage must be alleged and proved; and it must also be a natural or necessary consequence of the trespass.⁵ *Lavender v. Betts*⁶ is an interesting case of a person held liable for committing a trespass and nuisance on his own property in the possession of his tenant. The defendant had given the plaintiff notice to quit as the latter had failed to pay arrears of rent, but by reason of certain statutory provisions the tenancy could be terminated only by the landlord taking a proceeding in court. He however preferred the extra-judicial remedy of self-help and went to his premises and had the doors and windows removed, expecting thereby his tenant to leave. But she sued him for trespass and he was mulcted in punitive damages (£ 45) and costs for this high-handed mode of causing discomfort to her.

48. Damages for physical injury to property.—The measure of damages will ordinarily be the depreciation in the value and not the cost of

1. See per Erle, C. J. in *Skull v. Glenister*, (1864) 16 C.B.N.S. at p. 103.

2. Bowen, L. J., in *Phillips v. Homfray*, (1883) 24 Ch. D. 439 at 461; *Ramaswami v. Meenakshisundaram*, (1924) 47 M.L.J. 922; 1925 Mad. 222.

3. *Jegon v. Vivian*, (1871) L.R. 6 Ch. 742; *Phillips v. Homfray*, (1871) L.R. 6 Ch. 770.

4. *Whitwham v. Westminster Brymbo Coal Co.*, (1896) 2 Ch. 538.

5. *E.g.*, infection of cattle, *Theyer v. Purnell*, (1918) 2 K.B. 333; cf. *Cooke v. Waring*, (1863) 2 H. & C. 332 where the action was not for trespass but for keeping dangerous animals; as to fright and nervous shock due to a trespass, see *Dulieu v. White*, (1910) 2 K.B. 669; see also *Huxley v. Berg*, (1815) 1 Stark. 98 (damage remote and only a matter of aggravation).

6. (1942) 2 A.E.R. 71. The landlord was also convicted for causing a statutory nuisance under the P.H. Act, 1936, s. 92; *Betts v. Penge*, U.D.C. (1942) 2 K.B. 154.

restoration.¹ It would be, for instance, where a trench is cut and soil is taken, the diminished value of the land;² or where a house is burnt or pulled down, the value of that house and not the cost of building a new one.³ If it were otherwise, "it would follow that a party who has let the sea in upon the land of another, the land itself being worth £ 20, would have to pay by way of damages the expense of excluding it again by extensive engineering operations."³ But if restoration is a necessary consequence as being a prudent course to adopt in the particular case it will have to be paid for, *e.g.*, when a roadway is cut up or let down.⁴ Here again matters of aggravation may enhance the damages.⁵ In assessing the loss of value, the extent of the plaintiff's interest in the property, *e.g.*, whether it is a leasehold or reversionary interest will be material.⁶ But in a case of trespass by entry a lessee or even a person in possession without title may get the same damages as an owner. If any material is severed from the land the plaintiff can recover either the diminished value of the property or the price of the severed chattel, whichever is better for him. In the old procedure he was allowed to sue in trespass or waive the trespass and sue in trover. Thus if fixtures had been removed the plaintiff could sue in trespass and recover the loss in the value of the house.⁷ But if he made the mistake of suing in trover he could only recover their smaller value as chattels.⁸ But now a plaintiff may ask for the reliefs alternatively in the same suit or amend his claim. If coal is severed from the plaintiff's soil he would sue in trover and ask for the value of the coal where it was found, *i.e.*, at the pit's mouth. In these cases the question has arisen whether the defendant could claim any deduction for the cost of hewing and raising the coal. The difficulty in answering it is that if deduction is allowed he gets payment for his own wrongful act somewhat like a burglar being allowed to set off in an action

1. *Jones v. Goody*, (1841) 8 M. & W. 146; *Whitham v. Kershaw*, (1885) 16 Q.B.D. 613; *Hosking v. Phillips*, (1848) 3 Ex. 168; *Krishna v. Radhika*, (1929) 53 C.L.J. 148; 1931 Cal. 462. For limitation of liability by statute for damage to property as well as to person, see the Air Navigation Act, above, Chap. II, para. 10; and the Merchant Shipping Act, 1894, above, (Chap. II, para. 12), extended to damage to any property in land or water by (1900) 63 & 64 Vict. c. 32, s. 1, and limiting the amount to £l. for every ton of the ship's tonnage.

2. *Newcastle v. Broxtove*, (1832) 4 B. & Ad. 273; *Moss v. Christ Church Rural Council*, (1925) 2 K.B. 750.

3. *Per* Alderson B, in *Jones v. Goody*, (1841) 8 M. & W. 146 at p. 147.

4. *Mayor of Wednesbury v. The Lodge Holes Celliery Co.*, (1907) 1 K.B. 78. Where a house is wrongfully built, the cost of removing it can be recovered; *Sikkander v. Mahomed*, (1913) M. W. N. 648; 21 I.C. 45.

5. *Davis v. Bromley Urban Council*, (1903) 67 J.P. 275.

6. See *Rust v. Victoria Graving Dock Co.*, (1887) 36 Ch. D. 113; *Twyman v. Knowles*, (1853) 13 C.B. 222; *Attersoll v. Stevens*, (1808) 1 Taunt 183; *Clarke v. Ramus*, (1891) 2 Q.B. 456. 7. *Thompson v. Pettitt*, (1847) 10 Q.B. 101.

8. *Clarke v. Holford*, (1848) 2 C. & K. 540.

for the value of the stolen goods the cost of carrying them or picking the locks. On the other hand if it is not allowed the plaintiff gets payment for an item of expense which he never incurred but is indispensable for making the coal valuable.¹ The courts arrived at the equitable though rather rough and ready solution, *viz.*, that the deduction should be allowed for a person who took the coal under a *bona fide* belief of his title,² but not for one whose trespass was wilful, fraudulent or even negligent.³ A person who entered and cut timber on another's land was treated in the same way.⁴ The plaintiff may claim compensation for any special damage which is a natural consequence of the injury, *e.g.*, loss of amenity of adjacent property.⁵ If he fails to do so, he cannot separately sue for it.⁶ For instance if the plaintiff sues for a wrongful excavation in his land he must claim compensation also in respect of any prospective loss *e.g.*, any subsidence that is likely, and cannot sue for it after it occurs.⁷ But if an excavation is not wrongful *per se*, as where it is on the defendant's own land, or on the plaintiff's land under a licence or grant, the cause of action is not the excavation, but the damage by subsidence.⁸ In such cases a fresh suit will lie for every cause of action.

49. Mesne profits or damages for dispossession.—The plaintiff would get 'mesne profits'⁹ *i.e.*, the profits which the defendant actually received or might with ordinary diligence have received during the period of dispossession.¹⁰ The defendant will not be heard to say that he did not

1. Mayne, Damages, p. 380.

2. *Jegon v. Vivian*, (1871) L. R. 6 Ch. 742; *Livingstone v. Rawyards Coal Co.*, (1880) 5 A. C. 25; *Townend v. Askern Coal & Iron Co.*, (1934) 1 Ch. 463; *Currimbhoy v. Crest*, (1929) I. L. R. 57 Cal. 170, 201; *Hari Prashad v. Hanumantrao*, I. L. R. 1936 Nag. 70; 1937 Nag. 74.

3. *Phillips v. Homfray*, (1871) L. R. 6 Ch. 770; *Martin v. Porter*, (1839) 5 M. & W. 351; *Wood v. Morewood*, (1841) 3 Q. B. 440; *Bulli Coal Mining Co. v. Osborne*, (1899) A. C. 351; *Llynvi Co. v. Brogden*, (1870) L. R. 11 Eq. 188; *The London Colliery Co. v. Bipin Bihary*, (1920) 55 I. C. 113 (Pat.): 57 I. C. 307 (Pat.).

4. *Glenwood Lumber Co. v. Phillips*, (1904) A. C. 405.

5. *Rust v. Victoria Graving Dock Co.*, (1887) 36 Ch. D. 113 at 131; *West Leigh Colliery Co. v. Tunncliffe & Hampson*, (1908) A. C. 27.

6. *Clegg v. Dearden*, (1848) 12 Q. B. 576.

7. *Spoor v. Green*, (1874) L. R. 9 Ex. 99.

8. *Backhouse v. Bonomi*, (1861) 9 H. L. C. 503; *Darley Main Colliery Co. v. Mitchell*, (1846) 11 A. C. 127; *Crumbie v. Wallsend Local Board*, (1891) 1 Q. B. 503; *cf. Great Laxey Mining Co. v. Clagan*, (1878) 4 A. C. 115. 9. S. 2 (12), C. P. C.

10. *Kamini v. Krishna*, (1910) 16 C. L. J. 93; 10 I. C. 312; *Dussan v. Bhawani*, (1913) 17 C. W. N. 984; 19 I. C. 974; *Dalgeish v. Nandan*, (1917) 39 I. C. 516 (Pat.); *Kunhi Kurumban v. Lakshmi*, 1928 Mad. 387; *Harry v. Bhagu*, (1930) I. L. R. 9 Pat. 621 P. C.; 57 I. A. 105; *Raja Bhupendra v. Rajeswar*, (1930) 35 C. W. N. 367; 1931 Cal. 802; *Surendralal v. Sultan Ahmed*, (1934) I. L. R. 62 Cal. 217; 38 C. W. N. 1197. The basis is not produce but cash rent obtained by a trespasser who lets out the land; *Harry v. Bhagu*, above; *cf. Secretary of State v. Purnachandra*, (1926) 44 C. L. J. 559; 99 I. C. 923.

cultivate the lands¹ and got no profit, or that he remitted rents.² He is not, however, liable for failure to realise the highest possible rents, if he had realised a fair return from the tenants.³ Oftentimes it would be material to consider what the plaintiff would have realised if he were in possession, *e.g.*, when the defendant cultivated a less profitable crop on the land than what the plaintiff was doing before. On the other hand the plaintiff cannot claim any additional profits derived by improvements made by the defendant.⁴ Nor can the defendant claim the value of his improvements, unless the true owner can be said to have acquiesced in his making them.⁵ In computing the profits, the defendant is entitled to claim a deduction of the cost of cultivation⁶ and other necessary charges incurred like rates and taxes.⁷ In some cases he has also been allowed the cost of management or collection.⁸ In assessing damages the court will naturally be influenced by the defendant's conduct and would treat a *bona fide* trespasser more considerably than a wilful and wanton one. As the Privy Council observed: "Mesne profits are in the nature of damages which the court may mould according to the justice of the case."⁹

1. *Thavasi v. Arumugam*, (1916) 30 M. L. J. 326 : 28 I. C. 1; *Jogendra v. Ram Gopal*, (1927) 45 C. L. J. 462; 1927 Cal. 616.

2. *Kales Debee v. Modhoo*, (1871) 16 W. R. 171; *Kishanand v. Kunwar*, (1884) I. L. R. 10 Cal. 785 P. C. : 11 I. A. 88.

3. *Secretary of State for India v. Saroj Kumar*, (1935) 62 Cal. 499 P. C. : 62 I. A. 53.

4. *Raja Rai Bhagwat v. Ram Ratnam*, (1921) 42 M. L. J. 243 P. C. : 1922 P. C. 91.

5. *Ramsden v. Dyson*, (1865) L. R. 1 H. L. 129; see also *Cawdor (Earl) v. Lawis*, (1835) 1 Y. & C. 427; *Ranchodlal v. Secretary of State for India*, (1910) I. L. R. 35 Bom. 182; 13 Bom. L. R. 92.

6. *Hurro Durga v. Surui Sundari*, (1881) I. L. R. 8 Cal. 332 P. C. : 9 I. A. 1; *Sankara Rayamma v. Venkatratnam*, (1912) 24 M. L. J. 30 : 18 I. C. 615; *Baldeo v. Ram*, (1918) 4 Pat. L. J. 301; 51 I. C. 747.

7. *Dakina v. Saroda*, (1893) I. L. R. 21 Cal. 142 P. C. : 20 I. A. 160; *Mahipatti v. Subbayamma*, (1911) 2 M. W. N. 308 : 12 I. C. 385; *Ramu v. Maniappu*, (1916) 33 I. C. 520 (Mad.).

8. *McArthur v. Cornwall*, (1892) A. C. 75; *Abdul Ghafur v. Raja Ram*, (1901) I. L. R. 23 All. 252; *Kachur Ala v. Sha Oghadbbhai*, (1892) I. L. R. 17 Bom. 35; *Secretary of State for India v. Saroj Kumar*, above, (10% is customary); *Sewak Ram v. Municipal Board, Meerut*, 1937 All. 328. By reason of S. 2 (12), C. P. C., there is no distinction in this respect between a *bona fide* and a wilful trespasser; *Dhanarajgerji v. Parthasarathy*, (1934) I. L. R. 57 Mad. 49; but see *Dungar Mal v. Jail Ram*, (1902) I. L. R. 24 All. 376; *Sashikanta v. Sarat*, (1921) 34 C. L. J. 415 : 1921 Cal. 699; *Umashankur v. Ram Lal*, 1924 Nag. 427. For other deductions, see *Venkayamma v. Narayanaswami*, (1912) 22 M. L. J. 253 : 14 I. C. 396.

9. *Grish Chunder v. Shoshi*, (1900) I. L. R. 27 Cal. 951 P. C. at 967 : 27 I. A. 110. As to interest on mesne profits, see *ibid.* As to burden of proof of amount of profits, see *Secretary of State v. Saroj Kumar*, (1934) I. L. R. 62 Cal. 499 : 39 C. W. N. 405 (P. C.); *Dhanarajgerji v. Parthasarathy*, (1932) I. L. R. 57 Mad. 49 : 66 M. L. J. 263. As to presumption against the defendant from his failure to give evidence, see *McArthur v. Cornwall*, (1892) A. C. at 89; *Brojendro v. Madhub*, (1882) I. L. R. 18 Cal. 343, 350; *Mahabir Pershad v. Radha Pershad*, (1891) I. L. R. 18 Cal. 540 P. C. The P. C. will not vary amount in appeal; *Dhanarajgerji v. Panuganti Parthasarathy* 1938 P. C. 139.

The case of wilful trespass underground and appropriation of coal or other minerals is an instance of a total refusal of deductions to the trespasser. Courts do not treat trespassers overground with the same severity, because underground trespasses are more surreptitious and cause permanent injury to the property.

50. Extension of the meaning of 'mesne profits'.—In modern use the term 'mesne profits' has been enlarged beyond its original meaning of damages for trespass and includes profits realised by a person whose possession did not originate in a trespass but was nevertheless wrongful,¹ e.g.; a lessee holding over after his term. The phrase is also loosely identified with a claim for "use and occupation."² This is perhaps due to the fact that under the old procedure the plaintiff could waive the trespass and sue on an implied contract to pay rent for use and occupation. This was, however, possible only when a contract could be implied from the plaintiff's permission or sufferance of the defendant's occupation. When this could not be done, as where the defendant took possession under a hostile claim of title, the proper remedy was an action for mesne profits. Though the old procedure is gone, it is still necessary to bear in mind the distinction between the two claims in such cases.³

51. Mesne profits in cases of several trespassers.—When the trespass is jointly committed by several persons all are equally liable for the whole amount of profits though they are in possession of different parts of the property.⁴ A trespasser who lets the property to a tenant and receives rent from him may be liable as a joint wrongdoer with the tenant who keeps out the real owner.⁵ In cases where a right of

1. In the old procedure the remedy in such a case was the action of ejectment, but as mesne profits could not be got in it, it was usual to get a decree and then sue in trespass for mesne profits which were allowed by applying the fiction of trespass by relation and assuming that the owner had by that decree got possession from the date when he was entitled to it; *Cole, Ejectment*, p. 635; above, para. 10. Now claims for property and mesne profits can be combined. *R.S.C., O., 18, r. 2*; in *India C.P.C., O. 2, r. 4 & O. 20, r. 12*.

2. *Kuppanna v. Kuppanna*, (1915) *M.W.N.* 319, 323; 29 *I.C.* 195.

3. See *Woodfall, Landlord & Tenant*, Ch. XIV, p. 670; *Phillips v. Homfray*, (1883) 24 *Ch. D.* 439 at p. 461. As to Indian cases where the distinction was material, see *Makhan v. Goribullah*, (1890) 1 *L.R.* 17 *Cal.* 541; *Vira Pillai v. Rangarwamy*, (1898) 1 *L.R.* 22 *Mad.* 149; *Chinna Jogayya v. Venkatesubbiah*, (1911) 12 *I.C.* 428 (*Mad.*); *Hamdeo v. Panday*, (1912) 13 *I.C.* 20 (*Cal.*); *Gajjar v. Gurni*, 1925 *Lah.* 196; *Hussain Bi v. Abdul Rahiman*, (1931) 8 *Mys. L. J.* 443.

4. *Hume v. Oldacre*, (1816) 1 *Stark* 351; *Clark v. Newsam*, (1847) 1 *Ex.* 131, 139; *Bireskur v. Baroda Persad*, (1906) 15 *C.W.N.* 825; 11 *L.C.* 504; *Shama Sunkur v. Sreenath*, (1869) 12 *W.R.* 354; *Jhoonkee v. Afsoodhya*, (1873) 19 *W.R.* 218; *Ramchunder v. Ramchunder*, (1875) 23 *W.R.* 226. As to contribution between them, see below, Chap. XIX, para. 36.

5. *Doe v. Harlow*, (1840) 12 *A. & E.* 40; *Henderson v. Squire*, (1869) 1 *L.R.* 4 *Q.B.* 170; *Mudun Mohun v. Ram Dass*, (1880) 6 *C.L.R.* 357 at 359; *Lewis Pugh v. Ashutosh*, (1928) 1 *L.R.* 8 *Pat.* 516 *P.C.*; 56 *I.A.* 93; but see *Raja Bhupendra v. Rajerwar*, (1930) 35 *C.W.N.* 367; 1931 *Cal.* 802; under s. 50, *T.P. Act*, a tenant who pays the rent *bona fide* to his immediate landlord is excused from paying it again.

contribution is available among them, the court may pass a decree ascertaining their several liabilities to the plaintiff.¹ When there was no joint trespass or other illegal act done in concert, persons in wrongful possession of separate items of property will be liable only for the profits of these items in their respective possession.² A trespasser would not be liable for profits after he himself has been ousted by another who will however be liable.³

52. Recovery of possession.—This relief can be had in the following three proceedings.

53. Action for recovery of possession.—This is usually known as the action of ejectment. In this action the plaintiff must prove his title, not merely a better one than the defendant's but good against all the world.⁴ But if he proves that the defendant wrongfully dispossessed him, he can recover on the strength of his prior possession alone.⁵ The suit must be within twelve years of the plaintiff's dispossession or the commencement of the defendant's adverse possession.⁶

1. *Basanta Kumar Basu v. Lala Ram*, (1932) I. L. R. 59 Cal. 859; *Kalidas v. Satyesh Chandra*, 1933 Cal. 554. Below, Chap. XIX, para. 36.

2. *Ram Bilas v. Amir Singh*, (1920) 61 I. C. 426; *Gurudas v. Hemendra*, (1929) I. L. R. 57 Cal. 1 P. C.: 56 I. A. 290; *Basantakumar Basu v. Ramshankar Ray*, (1931) I. L. R. 59 Cal. 859; see also *Nawab Nazim v. Raj Comaree*, (1866) 6 W. R. 113; *Krishna v. Kunjo*, (1881) 9 C. L. R. 1. For a case of trespass by cattle of several persons, see *Harkrishna v. Qurban*, I. L. R. 17 Luck. 284; 1942 Oudh. 73.

3. *Abbas v. Passihudin*, (1887) I. L. R. 24 Cal. 413; *Madan Kapali v. Krishna*, (1931) 35 C. W. N. 305; 1931 Cal. 663. Nor for the period before he trespassed; *Damodar v. Miller*, 1921 Pat. 102.

4. Above, para. 16. When the plaintiff is one of several owners he can sue on behalf of the others to eject the trespasser; *Syed Ahmed v. Magnesite Syndicate*, (1915) I. L. R. 39 Mad. 501; 28 M. L. J. 598; *Pitamberdas v. Bhawanilal*, 1932 Sind 220; *Ram Charan v. Bansidar* 1942 All. 358. When several persons are in possession all must be joined as defendants; *Arunodaya v. Mahammad*, (1927) 46 C. L. J. 433; 1928 Cal. 138. This is the appropriate remedy for dispossession and not damages; *Ladooram Sowcar v. Nidamarti*, 1938 Mad. 463.

5. Above, paras. 15 and 16; see also *Ram Dayal v. Saraswati*, (1926) I. L. R. 49 All. 191; 25 A. L. J. 281; *Venkayya v. Sateyya*, (1911) I. L. R. 37 Mad. 281; *Ganapathi v. Venkata*, (1914) M. W. N. 728; 25 I. C. 109; *Maikal v. Thamburwami*, (1914) M. W. N. 784; 25 I. C. 934; *Muhammad v. Muhammad*, (1921) 66 I. C. 237 (Mad.); *Labb Singh v. Ahmad Singh*, (1926) 97 I. C. 369 (Lah.); *Ma Pua v. Mu Pan*, (1927) I. L. R. 5 Rang. 154; *Uttam v. Tabu*, (1928) 10 Lah. L. J. 480; *Chaturbuj Singh v. Sarada Charan*, (1932) I. L. R. 11 Pat. 701. But the plaintiff must clearly put forward such a claim and cannot fall back on it after suing on title; *Maikal v. Thamburwami*, (1914) M. W. N. 784; 25 I. C. 934; *Ganesh Rui v. Bhumi*, (1924) I. L. R. 46 All. 903; *Govindbhai v. Dahyadhag*, 1936 Bom 201.

6. Arts. 142, 144, Limitation Act; *Dharani v. Gardar Ali*, (1912) 17 C. W. N. 389 (P. C.); 18 I. C. 17. As to difference in the parties to be joined as defendants between actions of ejectment and trespass, see *Arunodaya v. Mahammad*, (1927) 46 C. L. J. 433; 1928 Cal. 138.

54. Action under S. 9 of the Specific Relief Act.—This action should be instituted within six months of the trespass. The plaintiff need not prove any title but only his effective and exclusive possession at the time of the trespass.¹ This is a summary remedy and no appeal is allowed from the decree in the suit. If the defendant is the true owner he can get back possession by a suit based on his title. There is a disposition in many courts to treat this statutory remedy as wider than the common law action of trespass and extend its benefit to landlords² and owners of incorporeal rights and interests as against adverse claimants.³ In a suit under s. 9 there can be no decree for mesne profits.⁴ It is not an exclusive remedy but one in addition to the suit on possessory title which may be brought beyond six months of the dispossession.⁵

55. Proceedings under S. 145, Criminal Procedure Code.—This is another summary remedy provided in India in the interests of public peace. A magistrate can, on information that a dispute likely to cause a breach of the peace exists concerning any land or water or right of user of land or water, make an enquiry about the fact of possession, and restore possession to the party who is proved to have been dispossessed within two months of the commencement of the proceedings. He can also maintain the party in possession free from disturbance by the opposite party. The party who fails in these proceedings may sue in the civil court for recovery of possession on the strength of his title or under s. 9 of the Specific Relief Act.⁶

56. Declaration of title.—If the trespass is only an attempt, but not an effective one, to disturb the plaintiff's possession and is accompanied by an assertion of title, the plaintiff may sue for a declaration of his title under s. 42 of the Specific Relief Act. But the plaintiff cannot get it if he is able to seek any further relief and omits to do so.⁷ Therefore a person who has lost his possession cannot sue for a mere declaration but must also sue

1. *Tamizuddin v. Ashrub Ali*, (1904) I. L. R. 31 Cal. 647, 656; cf. *Dadhabhai v. Sub-Collector of Broach*, (1870) 7 Bom. H. C. (A. C. J.) 82 and *Amiruddin v. Mahamad*, (1891) I. L. R. 15 Bom. 685.

2. *Ratan Lal v. Amar Singh*, (1929) I. L. R. 53 Bom. 773; 31 Bom. L. R. 1042; *Rajkumar v. Alimia*, (1923) 37 C. L. J. 94; 1923 Cal. 192; for other cases, see above, para. 4.

3. *Inasi v. Sivagnana*, (1894) 5 M.L.J. 95 (denial of title of a landholder who is only a melwaramdar); above, para. 4.

4. *Tilak v. Fatik*, (1890) I. L. R. 25 Cal. 803; *Abdul Kadi v. Uthumansa*, 1927 Mad. 722. 5. *Pannalai v. Bhatyalal*, 1937 Nag. 281.

6. *Jwala v. Ganga Prasad*, (1908) I.L.R. 30 All. 331; 5 A.L.J. 297; *U. Kyaw Lu v. U. Shwe So*, (1928) I.L.R. 6 Rang. 567.

7. The rule is different in England; R. S. C., O. 25. r. 5.

for possession.¹ The court will not grant a declaration unless some trespass or other disturbance is proved.²

57. Injunction.—The plaintiff may also ask for an injunction to prevent any continuing or attempted trespass by the defendant.³ If he has lost possession he must sue for possession and not for an injunction. One co-owner may seek this remedy against another who disturbs the common enjoyment, *e.g.*, by pulling down a building, or erecting one on agricultural land.⁴ Where there is an ouster of a co-owner the proper remedy would be a suit for partition or joint possession. An injunction is of course a discretionary remedy and not obtainable as of right.⁵

58. Injury to reversion.—An injury to the reversionary interest of the owner of property in the possession of a tenant or other holder of a subordinate interest may arise as follows. (a) Physical injury of a permanent nature to the property or a trespass accompanied by assertion of a hostile title by a stranger. The remedy in the former case is an action for damages for the injury to the reversionary interest. In the latter case the reversioner can sue for a declaration of title and may also ask for possession on behalf of the lessee or other person in possession.⁶ (b) Injury to the property by a tenant. This is known as 'waste' in the English law of real property.⁷ The duties of a tenant are regulated primarily by contract and often also by the general law or custom. They fall within the domain of the law of property and not of the law of torts.⁸ In India the subject is governed by the Transfer of Property Act⁹ and by the Tenancy Acts.¹⁰

1. This rule cannot be got round for avoiding the higher court-fees payable on a prayer for possession by asking for confirmation of possession; *Ramchurn v. Khnor Pandey*, (1868) 10 W. R. 176; *Amir Hossein v. Imambandi*, (1882) 11 C.L.R. 443. But the dismissal will not bar a later suit properly framed; *Sayed v. Bontala*, (1913) I. L. R. 38 Mad. 247; 25 M.L.J. 125.

2. *Earl of Dysart v. Hamnerton*, (1914) 1 Ch. 822; (1916) 1 A.C. 57.

3. *Goodson v. Richardson*, (1873) L.R. 9 Ch. 221; see Zechariah Chafee, *Cases on Equitable Relief against Torts*, p. 35.

4. *Crowdee v. Bhekdari*, (1871) 8 B. L. R. (Appx.) 45 (growing indigo crop and rendering property valueless); *Sheo Pershad v. Leela Singh*, (1873) 12 B.L.R. 188; *Ram Bahadur v. Ram Shunker*, (1905) I.L.R. 27 All. 688; 2 A.L.J. 455; *Anandachandra v. Parbatshi*, (1906) 4 C.L.J. 198.

5. *Mohan Chand v. Isak Bhai*, (1900) I. L. R. 25 Bom. 248; 2 Bom. L. R. 898; *Fanilatuniessa v. Ijaz Hassan*, (1903) I.L.R. 30 Cal. 901; *Phani Singh v. Nawab Singh*, (1905) I.L.R. 28 All. 161; *Dwijendra v. Purnendu*, (1910) 11 C.L.J. 189; 5 I. C. 171. Injunction is not available when there is a merely technical or trivial trespass without damage; *Llandudno Urban District Council v. Woods*, (1899) 2 Ch. 705; *Behrens v. Richards*, (1905) 2 Ch. 614.

6. Above, para. 12.

7. On this subject, see Blackstone, ii, 281; Co. Litt. 53-a, 54-b; Holdsworth, Vol. III, 121; Vol. VII, 275, 276; Chafee, *Equitable Relief against Torts*, p. 35.

8. The old remedy was the writ of waste provided by the Statute of Gloucester, (1278) which was afterwards superseded by an action on the case in the nature of waste, and was abolished along with real actions in 1833 by 3 & 4 Will. IV, c. 26, s. 36.

9. S. 108, T.P. Act.

10. *E.g.*, ss. 151, 153, Madras Estates Land Act.

59. **Injury to incorporeal rights.**¹—An incorporeal right in immovable property like an easement of way or light does not involve possession of the property over which it exists. Injuries to such rights are discussed in the chapter on Nuisance. When an incorporeal right involves an exclusive possession of the property which is the subject of the right, a disturbance of it will, as we have seen, amount to a trespass,² *e.g.*, injury to rights of ferry, market or fishery. When the injury to such rights amounts only to a disturbance of an exclusive monopoly or franchise, then the remedy was an action on the case. The action lay on proof of the violation of the right and apart from pecuniary damage.³

60. **Physical injury not amounting to trespass.**—Such injury would be indirect or consequential and may be a nuisance, *e.g.*, excavation on one's land so as to cause a subsidence of another's.

1. "Incorporeal hereditaments are principally of ten sorts: advowsons, tithes, commons, ways, offices, dignities, franchises, corrodies or pensions, annuities and rents." Blackstone, ii, 21; Holdsworth, Vol. VII, 314-318.

2. Above, para. 4.

3. *Hammerton v. Earl of Dysart*, (1916) 1 A.C. 57; *Nicholls v. Ely Beet Sugar Factory, Ltd.*, (1936) 1 Ch. 343; below, Chap. VI, para. 54. As to disturbance of an exclusive employment, see *Weller v. Baker*, (1769) 2 Wils. (K.B.) 414.

CHAPTER V

WRONGS TO MOVABLE PROPERTY

1. **Wrongs to movable property.**—These wrongs fall under the following five categories :—(i) Trespass, (ii) Conversion, (iii) Injury to reversion, (iv) Injury to incorporeal rights and (v) Physical injury not amounting to trespass.

2. **Points to be proved in an action of trespass.**—In an action of trespass to movable property, as in that of trespass to immovable property, the plaintiff must prove (a) that he was in possession of the property and (b) that his possession was disturbed by the defendant.

3. **Movable property.**—In the law of trespass and conversion, this phrase, like the word 'chattels', means corporeal or tangible property, *e.g.*, cattle, clothes, furniture, coins, cheques, documents. Things attached to the earth, like trees, houses and other fixtures, are 'immovable property' and become movable only when they are severed from the land.¹ In times and places where slave trade prevailed a slave was a valuable chattel.² Science has rendered air, gas, and electricity capable of appropriation and they would also be movable property. The phrase 'movable property' is used, however, in a larger sense in other contexts in the Indian law like 'personal property' in the English law. When it occurs in Indian enactments it has been defined to mean property of every description except immovable property.³ It includes the reversionary interest of a pledgor or bailor, incorporeal rights like patent rights, copyright, trademarks, and even a mere 'chose-in-action'⁴ or right to recover a debt like Government stock, debentures, shares in joint stock companies. But documents of title in respect of a chose-in-action, *e.g.*, share or stock certificates are tangible property.⁵ All these instances of corporeal and incorporeal property come under the designation of personal property, as the actions provided by the common law in respect of such property were called 'personal' as opposed to 'real' actions.⁶ The distinction between them lay in the fact that the plaintiff could recover the *res* or thing itself in the real action but could not in the personal action. In the latter he could only enforce against the wrongdoer a right *in personam* and obtain payment from him of a sum

1. In special contexts it may be otherwise; see Transfer of Property Act, s. 3; Registration Act, s. 2 (6); cf. C.P.C., s. 2 (13).

2. See the cases cited in Street, Vol. I, p. 258; III, p. 307.

3. General Clauses Act, 1897, s. 3 (34).

4. See *Punithavelu v. Bhashyam*, (1901) I.L.R. 25 Mad. 406; 12 M.L.J. 282.

5. *Maneckji Pestonji Bharucha v. Wadilal*, (1926) I.L.R. 50 Bom. 360 (P.C.); 53 I.A.

6. Williams, Real Property, pp. 8, 23; the phrase 'goods and chattels' is sometimes used as synonymous with 'personalty'; Goodeve, Personal Property, p. 2.

of money by way of damages if he did not return the thing.¹ It was in 1854 that courts of common law got the power to compel specific restitution by seizure of the chattel, or imprisonment of the defendant in case of default.² By analogy, though without historical justification, the phrase 'movable property' in the Indian law has acquired an elasticity in meaning and comprehends the miscellaneous rights which are not 'immovable' or 'real' in the English law. In the present context, it is used in the limited sense aforesaid.

4. Possession of movable property.—As in the case of immovable property, the intent and power to possess are the material tests of possession. The following are some illustrations of the way in which these tests are applied to movables.

5. Finder.—A finder gets possession by finding and taking the article lost by the owner and can sue in trespass if any person other than the owner takes it away from him.³

6 Trespasser.—A trespasser has the possession though dishonestly acquired. He can sue another who takes the article away from him.⁴

7. Possession of things in land or premises.—The person in possession of land or premises is *prima facie* in possession of the things in it, *e.g.*, the clothes and the furniture in a house. *A* is the owner of a house. *B*, a friend, comes into it and sits at a table and writes on it; but he is not in possession of the chair, table or pen in the eye of law. *B* drops his money purse under the table and goes away, having forgotten to take it with him. *A* secures it in his box. *A* is in possession of *B*'s purse. If, however, *A* did not notice it, the question is one of some nicety. Probably the law would treat *B* as still in possession as he is likely to intend and has presumably the power to come and take it back when he remembers it. If *B* has thoroughly forgotten it or given it up as lost, then *A* may be treated as in possession of the purse by his occupation of the house. If *C*, another guest of *A*, comes into the house soon after and picks it up and puts it into his pocket, intending to take it home, *C* is now in possession and not *A* or *B*. In *Bridges v. Hawkesworth*⁵ some one had accidentally dropped a bundle

1. Holdsworth, Vol. III, p. 322; the distinction was emphasised and perpetuated as real property could not be devised by a will, but wills of personalty were recognised and given effect to by the ecclesiastical courts, and thus the law relating to succession to realty was evolved in the common law courts and that relating to personalty and the grant of probate in the ecclesiastical courts, which borrowed rules of the civil law for this purpose.

2. Common Law Procedure Act, s. 78.

3. *Armory v. Delamirie*, (1721) 1 Str. 505; 1 Sm. L.C., Vol. I, p. 396. But not if he loses it and another finder gets it, as the latter may plead the true owner's title; Clerk & Lindsell, Torts, p. 348.

4. Blackburn, J. in *Buckley v. Gross*, (1863) 3 B. & S. 566 at 574.

5. (1851) 21 L.J.Q.B. 75. On this case and the cases in the two following notes, see A.L. Goodhart, Essays in Jurisprudence and the Common Law, Chap. IV.

of bank notes in a shop open to the public. The shop-keeper did not notice it but another customer picked up the notes and gave them to the shop-keeper to find out the owner. The owner was not found and the finder claimed them from the shop-keeper. It was held that he could do so as he had the possession and the shop-keeper had no particular control over the article which lay in a part of the shop which was exposed to the public. If, however, the article lay in a private house or a part of the shop which was private, the control over articles in it would presumably be in the occupier and a finder who took it would be deemed to have taken it from his possession in the eye of law and would be bound to restore it to him. For instance, a person who was employed by the plaintiff to clean out a pond in the land occupied by him was held liable to restore to him two rings found in the course of cleaning, on the ground that the possession was with the plaintiff as occupier.¹ The possession of land is also possession of the things attached to or under the land. So it was held with reference to a prehistoric boat imbedded in the soil.²

8. Possession by symbolic delivery.—*A*, the owner of a warehouse, keeps his own goods in it. He sells them to *B* and hands the key of the house to *B*. *B* is in possession of the goods.³ If *C*, a thief, opens the warehouse with another key and takes the goods away, *C* is in possession of them though the key is with *A* or *B*. If *C* steals merely the key, *A* or *B* is still in possession.

9. Things incapable of possession.—Wild animals; fish, natural elements like air or water are not in the possession of any person till he seizes or appropriates them.⁴ Bees are *feræ naturæ* but when hived they become the property of the person who lives there.⁵ As to wreck washed ashore it was held that the Crown had the possession and a grantee of the franchise of wreck from the Crown had also the possession in law even before seizure or appropriation.⁶ There can be no property or possession in respect of a human body alive⁷ or dead.⁸

1. *South Staffordshire Waterworks Company v. Sharman*, (1896) 2 Q.B. 44; see also *Northam v. Bowden*, (1855) 11 Ex. 70; P. & W., Possession, p. 40.

2. *Elwes v. Brigg Gas Company*, (1886) 33 Ch. D. 562.

3. See *Gough v. Everard*, (1863) 2 H. & C. 1; *Ancona v. Rogers*, (1876) 1 Ex. D. 285. In the converse case of the owner of a locked box delivering the box but reserving the key, he is still in possession; *Reddell v. Dobrey*, (1839) 10 Sim. 244.

4. P. & W., Possession, pp. 230-232; Goodeve, Personal Property, p. 3; *Hannam v. Mockett*, (1824) 2 B. & C. 934. As to seaweed, *R. v. Clinton*, (1869) 4 Ir. R. C. L. 6; *Brew v. Haren*, (1877) 11 Ir. R.C.L. 198 (Ex. Ch.).

5. *Kearry v. Pattinson*, (1939) 1 K.B. 471; above, Chap. IV, para. 35.

6. *Bailiffs of Dunwich v. Sterry*, (1831) 1 B. & Ad. 831. As to wreck in midsea the salvor has possession and can sue a wrongdoer in trespass; *The Tubantia*, (1924) P. 78.

7. P. & W., Possession, p. 232.

8. *Williams v. Williams*, (1882) 20 Ch. D. 659, 665. The executors have a right to possession for burial; Clerk & Lindsell, Torts, p. 338.

10. Master and servant.—If *A* asks *B*, his servant, to keep his horse, *A* has the possession and *B* merely the custody. The proper person to sue in trespass is *A* and not *B*. But if *B* has dishonestly taken it for his own use, *B* is a thief or a trespasser and is in possession. If *A* constituted *B* as his bailee in respect of the horse,¹ *e.g.*, by asking *B* to use it for hire and drive it when and where he likes, *B* has the possession.

11. Bailor and bailee.—On a bailment² the possession passes to the bailee and therefore he is the proper person to sue a trespasser. The bailor has no possession and cannot sue a third person in trespass. An exception to this rule is that if the bailment is gratuitous or revocable at will, the bailor as well as the bailee can sue in trespass, though if one has sued, the other cannot.³ This is on the ground that the bailor has the present right to possession or, as it is said, has 'constructive possession.'⁴ But in other cases of bailments, *e.g.*, a bailment for a term, or a pledge, the bailor cannot sue a stranger in trespass.⁵ His remedy formerly was an action on the case for an injury to his reversionary interest, if the act complained of was of that character. At the present day the bailor as well as the bailee has a right to sue a stranger for damages for depriving the bailee of his use or possession of the goods.⁶ The cause of action would however be, if it became material to inquire, an injury to the reversion in the one case and a trespass in the other. As between the bailee and bailor, the former is in possession and cannot be sued by the latter in trespass unless it was a bailment at will or a revocable bailment and cancelled by the bailor. In other cases the remedy of the bailor is only to sue his bailee in detinue or trover for wrongful detention after the bailment has been lawfully terminated.⁷ Where a person had parked his car on another's ground on paying 1 s. and purchasing a ticket which stated that the latter was not liable for loss or injury to the car, the latter was not a bailee but only a licenser and possession did not pass to him.⁸

12. Trespass by relation.—The principle of trespass by relation has been applied to the case of executors and administrators who are thereby allowed to sue for a trespass to goods of the deceased committed before the

1. *Moore v. Robinson*, (1831) 2 B. & Ald. 817; P. & W., Possession, p. 60.

2. For definition of bailment see Indian Contract Act, S. 148.

3. See *Ward v. Macaulay*, (1791) 4 T.R. 489.

4. P. & W., Possession, pp. 145–147.

5. *Lotan v. Cross*, (1810) 2 Camp. 464; *White v. Morris*, (1852) 11 C.B. 1015. The case of *William Leitch & Co. v. Leydon*, (1931) A.C. 90 may be rested on this ground. As to this, see below, para. 16.

6. *Johnson v. Diprose*, (1893) 1 Q.B. 512 (mortgagee under a bill of sale not liable in trespass for removing goods from grantor before the full amount was paid).

8. *Ashby v. Tolhurst*, (1937) 2 K.B. 242.

grant of probate or administration, on the ground that their possession relates back to the time of death.¹

13. **Trespass 'ab initio'.**—The owner whose goods are taken away under colour of legal authority (*e.g.*, by a landlord for arrears of rent) can sue the taker in trespass if the latter does any wrongful act with reference to the goods.² Though at the time of the act the owner had no possession he is allowed to sue by treating the original taking itself as wrongful. Indeed this doctrine was first established with reference to goods and afterwards extended to trespass to immovable property and to the person.³

14. **Rules as to trespass and their historical evolution.**—It follows from the above, as in the law of trespass to land, that (a) an owner out of possession cannot sue in trespass, (b) a person in possession though not an owner but only a bailee or a wrongful possessor can sue and (c) that the trespasser cannot escape liability by denying the plaintiff's title or setting up a *jus tertii*. Indeed the principle that possession and possession alone gives the right to sue seems to have evolved first with reference to the remedies for loss of movables and then applied to the action for trespass to land also. It is traceable to the remedial law of Anglo-Saxon times in England and ultimately to "the common basis of Germanic custom."⁴ In a primitive society cattle was the typical chattel as the word itself shows, and was of greater value than land; and the chief concern of such a community was to prevent and punish cattle-thefts rather than land-trespasses. Thus historically the remedies for loss of chattels came earlier than those for land and were among the first experiments of early societies in the region of law. As the communities became more organised and their numbers increased, land became valuable for purposes of taxation and administration, and by reason of the feudal tenure, a source of wealth and power. The land law may have been younger but became richer and fuller and "outstripped its feebler rival, the law of chattels."⁵ The action of trespass which in origin was a criminal remedy and a substitute for the older remedy of the 'appeal' inherited the leading feature of the 'appeal' for theft or robbery that it was available only to the person who could make speedy pursuit of the thief.⁶ Therefore a bailor or other person who had voluntarily parted with possession in favour of another and who could rarely have been able to know of the theft and make speedy pursuit could not have the old remedy of 'appeal' or the action of trespass and its offshoot, the action of trover. His remedy was originally an action against the bailee on the contract of

1. *Tharpe v. Stallwood*, (1843) 5 M. & G. 760; *Morgan v. Thomas*, (1853) 8 Ex. 302; *Kirk v. Gregory*, (1876) 1 Ex. D. 55; see Patterson, J. in *Balme v. Hutton*, (1833) 9 Bing. 471 at 477.

2. *Oxley v. Watts*, (1785) 1 T.R. 12; *Harvey v. Pocock*, (1843) 11 M. & W. 740; *Canadian Pacific W. Co. v. Tuley*, (1921) 2 A.C. 417; *Owen & Smith v. Reo Motors*, (1934) 151 L.T. 274; above, Chap. IV, para. 40.

3. Holdsworth, Vol. VII, pp. 498-501; Ames, *Anglo-American Essays on Legal History*, Vol. III, pp. 428-43. The rule that the authority must have been by law arose from the old law of distress. A landlord who distrained his tenant's goods wrongfully was guilty of a trespass if he refused to return the goods in the tenant's action of replevin, whereas a bailee was not so liable if he refused to return the goods to his bailor.

4. Ames, *Anglo-American Essays on Legal History*, Vol. III, p. 417.

5. P. & M., Vol. II, p. 177.

6. P. & M., Vol. II, p. 170; Holdsworth, Vol. II, p. 78; Vol. III, p. 340.

bailment. It was at a much later time that his right to possession was recognised and he was allowed to sue a stranger in some cases. The bailee's right to sue a stranger and recover its value is, therefore, traceable to the early history of remedial law. It has been explained sometimes on a different ground, *viz.*, that he was liable over to the bailor and therefore allowed to sue a stranger.¹ In the case of *The Winkfield*,² the Court of Appeal rejected this theory and upheld the above historical explanation.

15. Disturbance of the plaintiff's possession by the defendant.—

It may assume the following forms :—

(a) Taking the thing away from the plaintiff's possession, or as it was called, an 'asportation.' The trespass would amount to the crime of theft or larceny if a dishonest intent were present, and to robbery if it was also forcible. When the defendant and not the plaintiff had the possession there can be no trespass; therefore a bailee damaging or disposing of the goods is not liable for trespass or theft.³ A dishonest servant who walks away with his master's goods is however liable in trespass as he has no possession but only the custody. Again if A's goods are taken by B from whom C takes them again, A can sue B but not C for trespass⁴ unless C aided B in the trespass or was otherwise a joint-wrongdoer. But A can sue C for conversion. The wrongful taking must be by the defendant himself or by his agent acting under his authority. It must be distinguished from maliciously procuring an attachment of another's goods by an order of court.⁵ In the latter, but not in the former case, malice is essential to make the defendant liable.

(b) Direct application of force. The forcible act may be accompanied with damage, *e.g.*, killing or injuring an animal or defacing a picture or work of art. Damage is not essential in trespass and even the slightest application of force like touching is wrongful.⁶

16. Liability for a trespassory injury to a chattel.—In an action for direct as well as indirect injury to a chattel, the plaintiff would have to prove intent or negligence, and the defendant would not be liable for inevitable accident.⁷ In the numerous actions for collision on land or

1. *Claridge v. South Staffordshire Tramway Co.*, (1892) 1 Q.B. 422; Bracton was the earliest to expound this view on the strength of the Roman law, as to which see Inst. IV, 1, 13-17. 2. (1902) P. 42; see below, paras. 63 and 64.

3. An exception in the criminal law is a carrier 'breaking bulk'; P. & W., Possession, p. 132. 4. *Mennie v. Blake*, (1856) 6 E. & B. 842.

5. Below, Chap. VIII, para. 16.

6. *Fouldes v. Willoughby*, (1841) 8 M. & W. 540; *Gaylard v. Morris*, (1849) 3 Ex. 695. Sir F. Pollock considers that such a rule may be salutary and necessary, as where valuable objects are exposed in places, either public or open, to a large number of persons; Torts, p. 280. Street considers, on the other hand, that actual damage is required; Vol. I, p. 16.

7. *Per Atkin, L. J. in Manton v. Brocklebank*, (1923) K. B. 212 at p. 229.

water since *Holmes v. Mather*,¹ it has never been suggested that the rules of liability for injury to the vehicles and to the persons in them are different. It is submitted that the above rule would apply *a fortiori* to a trespass by touching or handling a chattel without injury to it. If there was no hostile intent or breach of duty to use care, an action would not lie² any more than for such touching of another's person. The rule as regards trespass to immovable property continues to be different for reasons already explained.³

17. Remedies. (a) Extra-judicial: Retaking or Recaption.—The owner may retake his goods and may also use the necessary amount of force to do so.

(b) Judicial.—The following actions are available.

18. Action for damages.—Where the trespass has led to a total loss of the chattel, its full value can be recovered. Where no damage has resulted but only a right was infringed, nominal damages will usually be awarded.⁴ Aggravating circumstances will of course enhance the damages in a fit case.⁵ The defendant will also be liable for any special damage which is the natural consequence of the trespass.⁶ When a person removed certain goods from one room to another in the owner's house without authority he was held liable for the loss of the article due to such removal.⁷ The above principles are also applicable to the assessment of damages for collision of ships in the Admiralty Courts.⁸ In a case of total loss of a ship the damages would be the value of the ship as well as any

1. (1875) L.R. 10 Ex. 261; above: "If, in *Stanley v. Powell*, the shot, instead of hitting the beater, had hit a plate belonging to the host which had just been unpacked from a lunch basket, it is obvious that the defendant could not have been made liable"; Holdsworth, Vol. VIII, p. 266.

2. *William Leitch & Co. v. Leydon*, (1931) A.C. 90. Plaintiffs, manufacturers of aerated waters, sued to restrain defendant from filling up their bottles embossed with their names with aerated waters in his soda fountain. Injunction refused as there was no breach of duty of defendant to find out whether the bottles brought to him were theirs. Lord Blanesburgh held that the trespass complained of was self-inflicted as the bottles were sent to the defendant by plaintiffs by way of a trap order. Lord Dunedin suggested that the strict theory of trespass would not apply to Scotland from where the case arose.

3. Above, Chap IV, para. 19.

4. *Bayliss v. Fisher*, (1830) 7 Bing. 153; *cf. The Greta Holme*, (1897) A.C. 596.

5. *Williams v. Currie*, (1845) 1 C. B. 841; *Brewer v. Dew*, (1843) 11 M. & W. 625 at 629; *Gregory v. Cotterell*, (1852) 1 E. & B. 360; *Owen & Smith v. Reo Motors*, (1934) 151 L.T. 274; *Interoven Stove Co. v. Hibbard*, (1936) 1 A.E.R. 263.

6. See *eg. Gilbertson v. Richardson*, (1848) 5 C. B. 502; *Keene v. Dilke*, (1849) 4 Ex. 388.

7. *Kirk v. Gregory*, (1876) 1 Ex. D. 55.

8. *Admiralty Commissioners v. Chekiang*, (1926) A. C. 637, 661, *per* Lord Dunedin; *The Edison*, (1933) A. C. 449. For the special rule of the Admiralty Courts for contributory negligence, see below, Chap. XIV, para. 90.

profits which she would have earned on an existing contract.¹ In the case of partial injury the cost of repairs and other incidental charges and loss of profits or freight that would have been earned would be recoverable.² It has been held that even owners who do not use their ships for profit like the Admiralty or a harbour board, would be entitled to general damages for loss of use.³ An action for injury or loss due to a collision of a ship must be brought within two years.⁴

19. Action for injunction.—Besides damages, the plaintiff can pray in a proper case also for an injunction to prevent a continuing or threatened trespass.

20. Action of replevin.—In England a person whose goods are wrongfully taken by way of distress for rent or by way of distress damage feasant has an action of replevin for return of the goods.⁵ The peculiarity of this action is that on furnishing security or payment of the amount due he can have the things returned to him provisionally pending the decision of the case. The Indian procedure has no action of that name but there are statutory provisions,⁶ enabling tenants to get back on furnishing security goods distrained by landlords for arrears of rent.

21. Action of trover.—The plaintiff can waive the trespass and sue in trover for a conversion.⁷ In that case he ordinarily recovers the full value of the goods or may ask for their specific restitution. Indeed the action for trespass to goods has long since become rare and been superseded in actual use by the action of trover. It is still, however, the proper remedy when the trespass does not deprive the plaintiff of his possession or control and therefore does not constitute conversion, *e.g.*, damage done to goods while in the plaintiff's possession.⁸

22. Actions for 'rescue' and 'pound-breach'.—Under the English common law an action for 'rescue' (*rescous*) lay at the instance of the distrainer of goods against a person who wrongfully took them away after they had been seized and before they had been impounded. An action on the case for pound-breach lay when the goods had been wrongfully taken away after they had been impounded. Rescue and pound-breach were

1. *The Kate*, (1899) P. 165. 2. Mayne, *Damages* (10th ed.), p. 403.

3. *The Greta Holme*, (1897) A. C. 596; *The Mediana*, (1900) A. C. 113; *Admiralty Commissioners v. S. S. Chekiang*, (1926) A. C. 637; *Admiralty Commissioners v. S. S. Susquehanna*, (1926) A. C. 655; *The London Corporation*, (1935) P. 70.

4. Maritime Conventions Acts, 1911, s. 8.

5. For a modern instance, see *Swaffer v. Muleahy*, (1934) 1 K. B. 608.

6. *E.g.*, Madras Estates-Land Act (I of 1908), s. 87.

7. *Cooper v. Chitty*, (1756) 1 Burr. 20; see below, para. 24.

8. *E.g.*, *Simmons v. Lillystone*, (1853) 8 Ex. 431; for cases of wrongful attachment of goods in execution amounting to a trespass, see *Smith v. Keal*, (1882) 9 Q.B.D. 340; *Morris v. Salberg*, (1889) 22 Q.B.D. 614; *Clissold v. Cratchley*, (1910) 2 K.B. 244.

also offences under the common law. By a statute of 1689¹ the distrainer was enabled to sue in these actions for treble damages and costs of suit without any proof of special damage against the actual wrongdoer and also against the owner of the goods if they were found afterwards in his possession. By a later statute of 1737² a landlord was enabled to impound or secure the goods distrained in the premises for which rent was due and had an action for pound-breach in cases of wrongful removal of the goods from those premises as from a public pound. These statutes are still in force in England and their provisions are so stringent that even a stranger who unwittingly helped a tenant to remove the goods, *e.g.*, a removal contractor acting in the ordinary course of business, would be liable.³ There is no similar legislation in India. But statutes like the Tenancy Acts⁴ which enable landlords to distrain provide also for reparation for wrongful removal of the goods distrained.

23. Conversion.—The tort known by the name of 'conversion' has attained great prominence in the law of movable property and has largely superseded trespass. The name has acquired a highly technical meaning completely divorced from the literal sense of transformation or change of form. Indeed in the action for conversion not merely does a plaintiff not have to prove any such change by the defendant, but the plaintiff does not succeed merely by proving it. In the large majority of cases no change has occurred at all but the chattel is in the same state as it was before the alleged conversion. The usual allegation in the old action for conversion known as the action of trover was that "the defendant converted to his own use or wrongfully deprived the plaintiff of the use and possession of the plaintiff's goods."⁵ Conversion then consists in the deprivation of the plaintiff's use and possession. It comprises a large variety of acts which contain this ingredient of deprivation of use or of dominion and are otherwise dissimilar in character, *e.g.*, taking, detention, destruction. They need not amount to any conversion in the literal sense of transformation nor to any appropriation for the defendant's use (*e.g.* a carrier delivering the plaintiff's goods to another by mistake) or for anybody's use at all (*e.g.*, destruction of the goods by the defendant). To speak of them as 'conversion' or 'conversion to the defendant's use' is not merely technical but farcical, but these phrases have passed into the terminology of the subject and will persist for a long time.

1. Will. & Mary, c. 5, s. 4. By an Act of 1842 (5 & 6 Vict. c. 97, s. 2) treble costs were abolished and full costs were substituted. See *House Property Co. v. Whiteman*, (1913) 2 K.B. 382.

2. 11 Geo. 2, c. 19, s. 10. S. 3 gave an action for double damages for removal of goods before distraint.

3. *Lavell & Co., Ltd. v. O'Leary*, (1933) 2 K.B. 200 at pp. 205, 217. For other modern cases, see *Jones v. Biernstein*, (1900) 1 Q.B. 100; *Bevir v. British Wagon Co.*, (1935) 80 L.J. 162.

4. *E.g.*, Madras Estates Land Act (I of 1908), s. 90; s. 202 (2) provides also for a fine; Bengal Tenancy Act, s. 136.

5. Common Law Procedure Act, 1852, s. 49 and Sch. B.

Though forms of action have been abolished, these terms are still used in modern pleadings ¹ and in cases in England ² and in India.³

24. Old form of pleading in trover.—If the modern form of pleading employs unreal or technical terms, the older count in trover which it replaced in 1852 was an elaborate structure of fiction. It alleged "that the plaintiff was possessed as of his own property of a certain chattel; that he afterwards casually lost it; that it came to the possession of the defendant by finding (trover); that the defendant refused to deliver it to the plaintiff on request; and that he converted it to his own use, to the plaintiff's damage." Except the last allegation about conversion, the others were notorious fictions which it was unnecessary for the plaintiff to prove in the action. A greater discrepancy between the count and the evidence required to support it could hardly be found in any other action.⁴ These fictions are now happily no more, but they have left their marks on the law and are still of interest to us to explain some of the peculiarities in the rules about conversion.

25. Points to be proved in an action for conversion.—In the action for conversion, the plaintiff has to prove, (i) that he was in possession or had the immediate right to the possession of the chattel; (ii) that the defendant deprived the plaintiff of the possession or right of dominion over it.

26. The plaintiff's possession.—Conversion resembles trespass in that a mere possessor can sue the defendant unless the latter has a better title or right to be in possession. Possession is good against all the world but the true owner.⁵ The plaintiff may, therefore, be a bailee, a finder or even a trespasser. A bailee may be one for reward, *e.g.*, a carrier,⁶ or even a gratuitous bailee.⁷ He can sue a stranger or his own bailor, as where the bailment is for a term which has not expired and the bailor takes away the goods from the bailee.⁸ As regards a finder the leading case is *Armory v. Delamirie*⁹ where a chimney sweeper who found a valuable

1. See Bullen and Leake, Pleadings, pp. 283, 284.

2. Judges have often condemned its use, *e.g.*, per Lord Bramwell in *Hiort v. Batt*, (1874) L.R. 9 Ex. 86; and *Burroughes v. Bayne*, (1860) 5 H. & N. at pp. 302, 308; Collins, J. in *Consolidated Co. v. Curtis*, (1892) 1 Q. B. 495; Baggalay, L. J., in *Cochrane v. Rymill*, (1879) 40 L.T. (N.S.) 744. As to the technical character of the law of conversion, see per Lord Dunedin in *William Leitch & Co. v. Leydon*, (1931) A.C. 90, 102, 103.

3. The Indian Penal Code (ss. 403, 404) uses the phrase in the sense of dishonest misappropriation to one's own or another's use.

4. Ames, Anglo-American Essays on Legal History, III, 417.

5. *Jeffries v. G.W. Ry. Co.*, (1856) 5 E. & B. 802 at p. 803, per Lord Campbell, C.J.

6. *The Winkfield*, (1902) P. 42; *Eastern Construction Co., Ltd. v. National Trust Ltd.*, (1914) A.C. 197.

7. *Burton v. Hughes*, (1824) 2 Bing. 173; *Nicolls v. Bastard*, (1835) 2 C.M. & R. 659.

8. *Brierly v. Kendall*, (1852) 17 Q.B. 937.

9. (1721) 1 Stra. 505; Sm. L.C., Vol. I, p. 393; see also *Bridges v. Hawkerworth*, (1851) 21 L.J.Q.B. 75.

jewel gave it to the defendant, a goldsmith, to appraise its value and, on the defendant wrongfully refusing to return it, was allowed to sue him in trover.

27. The plaintiff's right to possession.—Conversion is wider than trespass because in an action for the former the plaintiff need not have had possession but can sue if he had an immediate right to possession. It is therefore a remedy for the protection of ownership though only in respect of one of its incidents, *viz.*, the present right to possess. A purchaser who has paid the price can sue his vendor or a stranger for conversion. A bailor in the case of a revocable bailment or a bailment at will can also sue.¹ In such cases both the bailor and bailee have the right to sue. If the bailment is for a term² or otherwise not revocable at will (*e.g.*, a pledge) the bailor cannot sue. But if the bailee does any act which by the contract or operation of law terminates the bailment, the bailor gets the immediate right to possession and can sue the bailee or a stranger in possession of the goods for conversion. Thus if a hirer sells or pledges the goods hired, the owner can sue the hirer as well as the purchaser or pledgee.³ A pledger cannot before he repays his debt and redeems the pledge sue the pledgee even if the latter wrongfully makes a sub-pledge.⁴ But it would be otherwise if by the terms of the contract the contract of pledge is terminated by the sub-pledge. A vendee who has not paid the price and has left the goods with the vendor cannot sue the vendor or a third party until he has paid or tendered the price; the vendor having a lien for the unpaid price has the right to sue in trover.⁵ But if by the contract, the vendee was to have the goods before payment he can sue the vendor who wrongfully resells them though in such cases he can recover not the full value of the goods

1. *Nicolls v. Bastard*, (1835) 2 C.M.R. 659; *Cooper v. Willomat*, (1845) 1 C.B. 672; *Manders v. Williams*, (1849) 4 Ex. 339; as to detainee, see *Nyberg v. Handelsaar*, (1892) 2 Q. B. 202; as to a trustee when the *cestui que trust* is in possession or custody, see *Barker v. Furlong*, (1891) 2 Ch. 172. 2. *Gordon v. Harper*, (1796) 7 T. R. 9.

3. *Mulliner v. Florence*, (1878) 3 Q.B.D. 484; see also *Cooper v. Willomat*, (1845) 1 C.B. 672; *Singer Manufacturing Co. v. Clark*, (1879) 5 Ex. D. 37; *Jelks v. Hayward*, (1905) 2 K. B. 460; *Ramasami v. Kamalammal*, (1921) I. L. R. 45 Mad. 173; 42 M.L.J. 32.

4. *Donald v. Suckling*, (1866) L. R. 1 Q. B. 585; *Halliday v. Holgate*, (1868) L.R. 3 Ex. 299; *Neckram v. Bank of Bengal*, (1891) I.L.R. 19 Cal. 322 (P.C.); 19 I. A. 60 (appropriation by pledgee); *Ramaswamy Chetty v. Palaniappa Chetty*, 1930 Mad. 364, (unauthorised sale); cf. *Bhimji v. Bombay Trust Corporation*, (1929) I.L.R. 54B. 381; 32 Bom. L.R. 64 (improper sale by the vendor of a motor car under a hire purchase system is a conversion).

5. *Lord v. Price*, (1874) L.R. 9 Ex. 54; see also *Hloxam v. Saunders*, (1825) 4 B. & C. 941; *Bradley v. Copley*, (1845) 1 C.B. 685 (mortgagee under a bill of sale of chattels of which the mortgagor is to remain in possession till default in payment cannot sue); *Venkatashubbayya v. Satyanarayanamurthy*, 1940 Mad. 489 (principal cannot complain of pledge of goods by agent purchased with latter's funds).

but the loss sustained by the resale.¹ A bailor who had no present right to possess could not sue in trover a stranger who injured his chattel, but his remedy was an action on the case.² At the present day the form of action is immaterial and he as well as the bailee can sue a stranger for damages for any permanent injury or deprivation.³

28. 'Plea of *jus tertii*'.—It follows that when the plaintiff relies merely on his possession the defendant who is a mere wrongdoer cannot set up the plea of *jus tertii* or the title of a third party.⁴ As against a wrongdoer, possession is title.⁵ He can, however, set up his own title or the title of a third party with the latter's authority.⁶ But if the plaintiff relies not on his possession but on his right to possess, the defendant can plead a *jus tertii* and show that the right is not in the plaintiff but in another.⁷ The position here is analogous to that in the action of ejectment already discussed,⁸ and involves the similar result of bringing into prominence the idea of absolute ownership 'good against all the world', through the medium of an action which was in origin delictual. But to the above rule there is an exception. A bailee is estopped from denying his bailor's title⁹ just as a tenant is estopped from denying his landlord's title. But a bailee is relieved from this disability, (a) if there is eviction by title paramount¹⁰; for instance if a third person claiming as owner takes the goods away from the bailee the bailor cannot sue the bailee for conversion and if he does, the bailee can set up the paramount title as a defence; (b) if the bailee has the authority of the third person claiming paramount title to defend the action.¹¹

29. Deprivation of the plaintiff's possession or right of dominion.—In order to constitute conversion there must be, (a) a positive

1. *Chinery v. Viall*, (1860) 5 H. & N. 288.

2. *Mears v. L. & S. Ry. Co.*, (1862) 11 C.B. (N.S.) 850.

3. Ss. 180, 181, Indian Contract Act. It has been suggested that the name 'conversion' may be extended to include the injury to the bailor's right or reversion. Salmond, Torts, p. 357; but see Street, Vol. I, p. 260 and *Oakley v. Lyster*, (1931) 1 K.B. 148, 153; per Scrutton, L. J. See also Restatement, § 220.

4. *The Winkfield*, (1902) P. 42, 54.

5. *Eastern Construction Co., Ltd. v. National Trust Co., Ltd.*, (1914) A.C. 197, 210.

6. Per Lord Campbell, in *Jeffries v. G. W. Ry. Co.*, (1856) 5 E. & B. 802, 805; *Glenwood Lumber Co. v. Phillips*, (1904) A.C. 405, 410; *The Winkfield*, (1902) P. 42 at 55.

7. *Leake v. Loveday*, (1842) 4 Man. & Gr. 972.

8. Above, Chap. IV, paras. 16 and 17.

9. *Biddle v. Bond*, (1865) 6 B. & S. 225; *Blaustein v. Malts, etc., Co.*, (1937) 2 K. B. 142; as to estoppel by attornment, see *Henderson v. Williams*, (1895) 1 Q.B. 521; but a stranger taking goods away from a bailee is not so estopped; *Richards v. Jenkins*, (1887) 18 Q.B.D. 451 (an execution-creditor of a bailee). 10. *Biddle v. Bond*, above.

11. *Biddle v. Bond*, above; *Rogers v. Lambert*, (1891) 1 Q.B. 318.

and voluntary act done by the defendant,¹ e.g., taking, disposal, refusal to deliver on demand. A mere non-feasance is not conversion.² A bailee who refuses on demand to restore the goods to his bailor is liable for conversion but not if he merely continues in possession without any demand by the bailor or loses the goods by neglect or accident.³ The wrong in such cases is not conversion but breach of contract or negligence. (b) The act must amount to some interference or inter-meddling which is inconsistent with or adverse to the plaintiff's right.⁴ His right is either to remain in possession or to resume it, in other words, to have the chattel in his control or dominion. Thus if a bailee who is bound to restore the goods at the end of the bailment refuses to do so on demand by the bailor, the detention is adverse to the bailor's right. Even if the bailee afterwards restores, the previous detention though temporary is to that extent a deprivation of the owner's right to have possession and control at all times and places. Similarly a destruction or disposal amounts to a deprivation. It is essential to remember that the two ingredients aforesaid constitute a complete conversion or 'conversion to the defendant's use' as the phrase goes, and the plaintiff need not prove (i) damage or loss, (ii) appropriation or use by the defendant or another, (iii) intent to deprive or cause loss to the plaintiff or gain to the defendant.

30 Intent to cause loss not necessary.—The plaintiff need not prove any such intent as it is presumed from the hostile character of the act⁵; nor is it open to the defendant to plead absence of such intent. It is no defence or excuse that he made an honest mistake about his own right or the right or identity of the true owner. A person who is not the true owner deals or meddles with another's property at his own peril.⁶ But the defendant's intent may often be material by way of proving the adverse character of the act. For instance, a person who finds an article lost by the true owner and takes it home does no wrong if he intended only to take and keep it till the owner claimed it, but commits a conversion if he then or

1. As to liability for a joint tort, see *Lewis Pugh v. Ashutosh*, (1928) I.L.R. 8 Pat. 516 P.C.

2. *Fouldes v. Willoughby*, (1841) 8 M. & W. 540; *Burroughes v. Bayne*, (1860) 5 H. & N. 296; *Hollins v. Fowler*, (1875) L.R. 7 H.L. 757; Holdsworth, Vol. III, p. 409.

3. *Ross v. Johnson*, (1772) 5 Burr. 2825; see *Howard v. Harris*, (1884) Cababe Ellis 253; cited in Kenny's Cases on Torts, p. 420; *Heald v. Carey*, (1852) 11 C.B. 977; *Newman v. Bourne and Hollingsworth*, (1915) 31 T.L.R. 209.

4. *Per* Atkin, I.J. in *Lancashire & Yorkshire Ry. Co. v. Mac Nichol*, (1919) 88 L.J. K.B. 601 at 605; *Oa't'cy v. Lyster*, (1931) 1 K.B. 148; *Surat v. Umar*, (1895) I.L.R. 22 Cal. 877, 883.

5. *Lancashire and Yorkshire Ry. Co. v. Mac Nichol*, (1919) 88 L.J.K.B. 601; see also *Garland v. Carlisle*, (1837) 4 Cl. & F. 693.

6. *Winter v. Banks*, (1901) 84 L.T. 594, *per* Lord Alverstone, C.J.

subsequently intended to appropriate it to his own use or do some other act adverse to the right of the owner. Again where a carrier or warehouseman in possession of goods refused to hand them over to the owner till the latter gave proof of his title it will be material to know whether he was *bona fide* in doubt about the plaintiff's title or whether he intended to keep the owner out of his goods temporarily or otherwise.¹

31. Instances of conversion.—We shall now deal with the following instances of conversion :—(i) taking from the plaintiff's possession ; (ii) detention ; (iii) delivery ; (iv) sale in 'market overt' ; (v) destruction ; (vi) unauthorised user ; (vii) conversion between co-owners.

32. Taking from the plaintiff's possession.—A mere taking or 'asportation' is an actionable trespass. But it is a conversion only if it amounts to an adverse exercise of dominion by the defendant. The usual instance is taking the plaintiff's chattel with a view to appropriate it for the use of the defendant or of another person. But that is not the only exercise of dominion that is possible. The defendant may intend merely to destroy it. He may claim, not the full ownership in the goods, but only a limited or subordinate right or as it is often called, 'a special property', *e.g.*, a lien.² He may only make a temporary use, *e.g.*, take another's horse for a ride and return it. In all these cases there is a conversion. But if the taking is not adverse to the owner's right or dominion it may be a trespass but not a conversion. 'Therefore 'every asportation is not a conversion.'³ In the case of *Fouldes v. Willoughby*⁴ the defendant who was the manager of a ferry boat removed the plaintiff's horses from the boat and put them on the shore in order to compel the plaintiff whose behaviour in the boat was considered objectionable, to leave the boat along with them. It was held that the removal was not a conversion though it might have been a trespass.⁵ Similarly if a person goes into another's house and takes some of the furniture and puts them outside the house, or a person does a mere physical injury to goods without interfering with the plaintiff's right of possession or ownership (*e.g.*, sawing a log of timber),⁶ he commits a trespass but not a conversion.

1 *Vaughan v. Watt*, (1840) 6 M. & W. 492, 497 ; see also *Alexander v. Southey*, (1821) 5 B. & Ald. 247 ; *Burroughes v. Bayne*, (1860) 5 H. & N. 296 ; *Pillott v. Wilkinson*, (1864) 3 H. & C. 345 ; *Clayton v. Le Roy*, (1911) 2 K. B. 1031.

2 *Tear v. Freebody*, (1858) 4 C.B.N.S. 228.

3 Channel, B. in *Burroughes v. Bayne*, (1860) 5 H. & N. 296 at pp. 305, 306.

4 (1841) 8 M & W. 540.

5. The further facts in the case were that the defendant had the horses taken to a hotel of his brother who demanded the cost of their keep for the day, before he would return them and had them sold to pay himself that cost. But these do not appear to have been relied on in the trial as evidence of conversion.

6. *Simmons v. Lillystone*, (1853) 8 Ex. 431.

33. Constructive taking.—The taking need not, unlike theft in the criminal law, be necessarily a physical moving or handling of the goods; it may be constructive as by a transfer in the books of a banker or warehouseman or endorsement of documents of title.¹ Preventing the owner by threat of force from taking possession of his goods is practically a dispossession or deprivation.² When a person takes possession of a house the question will be whether he intended to take possession of the things in it. In a case where a person who took possession of a land under a decree of court turned out from it the plaintiff's servants who were loading on a barge some lime belonging to the plaintiff, it was held that this act by itself was not a conversion unless there was an intent to deprive the plaintiff of the lime.³

34. Change of possession essential for taking.—A taking implies a change of possession. It is not a conversion to make a mere assertion of a hostile claim of title or a threat to take the plaintiff's goods, if there is no dispossession, actual or constructive.⁴ Nor is a bargain of sale or purchase without delivery, actual or constructive, an act of conversion.⁵ Again the taking or change of possession here spoken of is from the plaintiff himself. If *B* takes *A*'s chattel from *A* unlawfully and with intent to appropriate it for himself, *A* can sue *B* for trespass or conversion. If *C* now takes it from *B*, *B* has the same remedies against *C*. We saw that in such a case *A* cannot sue *C* in trespass.⁶ Can he sue *C* for conversion? If *A* makes a demand and *C* refuses to deliver, then *A* can sue *C* because the refusal is a distinctly adverse act. A demand is unnecessary if *C* commits an independent act of conversion, *e.g.*, a delivery or disposal to *D*. Again if *C* knew of *A*'s title when he took from *B* and asserted his own title, then also his act may amount to an adverse detention or appropriation against *A* and a demand may not be required. But if *C* took it from *B* in ignorance of *A*'s title, the authorities in England seem to warrant the proposition that the mere taking or receiving from *B* will not *per se* be a conversion and *A* cannot sue *C* before he makes a demand.⁷

1. *M'Combie v. Davis*, (1805) 6 East 538; as to constructive disposal or parting, see, *e.g.*, *Hiori v. Bott*, (1874) L.R. 9 Ex. 86.

2. *Oakley v. Lyster*, (1931) 1 K.B. 148; *cf. England v. Cowley*, (1873) L.R. 8 Ex. 126; *Moyi v. Avuthraman*, (1898) 1 L.R. 22 Mad. 197.

3. *Thorogood v. Robinson*, (1845) 6 Q.B. 769.

4. *Oakley v. Lyster*, above, does not really lay down, though the headnote suggests, the contrary. The defendant prevented the plaintiff from using or removing the goods.

5. *National Mercantile Bank v. Rymill*, (1881) 44 L.T. 767. 6. Above, para. 15.

7. *Spackman v. Foster*, (1883) 11 Q.B. D. 99; see also *Mennie v. Blake*, (1856) 6 E. & B. 842; *Miller v. Dell*, (1891) 1 Q.B. 468; *cf. M'Combie v. Davies*, (1805) 6 East 538; *Fine Arts Society v. Union Bank of London*, (1886) 17 Q.B.D. 703; *Burroughes v. Bayne*, (1860) 5 H. & N. 296 at p. 304, *per* Martin, B. See, however, *Restatement*, §§ 223, 229; *Street*, Vol. 1, 239; *Spencer Bower*, *Conversion*, Chap. VI. It has been suggested that the above rule would apply only to a case of pledge and not to one of taking by sale or otherwise; *Salmond*, *Torts*, p. 321.

35. Difference between trespass and conversion.—We see that the wrongs of trespass and conversion are in their nature really different and coincide only when the taking amounts to an adverse dominion. When the act is both a trespass and a conversion, the plaintiff in the old procedure waived the trespass and sued in trover on account of the greater popularity of the latter form of action. Though forms of action are no more, the difference in the cause of action may be material even now. For instance if the plaintiff alleges a trespass, he need prove only a taking; if he alleges a conversion, he must show that the taking was an adverse exercise of dominion. The distinction is also important for purposes of the statute of limitation; if there is no taking from the plaintiff or other act of conversion, he need not sue and can wait till a demand and refusal.¹

36. Detention : Actual Detention.—A detention amounts to a conversion if it is adverse to the right of the true owner; *e.g.*, when a bailee refuses to return the chattel to his bailor on demand by the latter after the period or purpose of the bailment is over. But he is not liable before the bailor makes a demand, because merely to continue in possession without a right to do so or to omit to redeliver is not an adverse act of deprivation.² It may, however, be a breach of contract.³ Similarly if by neglect or accident the bailee loses the chattel, he is not liable for a conversion though he may be liable for a breach of contract or for negligence.⁴ But if he wrongfully disposes of it there is an independent act of conversion, but it is not detention.

37. Proof of detention.—The usual method of proving an adverse detention is by proving a demand and refusal. They are indispensable to give a cause of action in all cases where the defendant is in possession of goods of which the plaintiff is entitled to possession, and has not committed any other act of conversion like taking, disposal, etc. They should be anterior to the suit; otherwise the suit will not lie.⁵ The refusal need not be in so many words as 'I refuse'; it may be shown by other words, *e.g.*, an open assertion of a hostile title to the knowledge of the owner, or by conduct, *e.g.*, a warehouseman after a demand by the owner locking up the warehouse and leaving the place.⁶

1. *Spackman v. Foster*, above; *Bhupendro v. Goonendra*, (1928) 32 C. W. N. 133; 1929 Cal. 42; *Ma Mary v. Ma Hla Win*, (1925) I.L.R. 2 Rang. 555.

2. *The Nordburg*, (1939) 1 A.E.R. 70 C.A. 3. Indian Contract Act, s. 160.

4. The remedy was not trover but detainee, *e.g.*, *Jones v. Dowle*, (1841) 9 M. & W. 19; *Reeve v. Palmer*, (1858) 5 C.B. (N.S.) 84; cf. *Clements v. Flight*, (1846) 16 M. & W. 42 (detinue not for mere omission to deliver); or assumpsit, *Williams v. Gesse*, (1837), 3 Bing. N.C. 849; or an action on the case for negligence.

5. *Clayton v. Le Roy*, (1911) 2 K.B. 1031.

6. See *Burroughes v. Bayne*, (1860) 5 H. & N. 296; *Jones v. Hough*, (1879) 5 Ex. D. 115; *Philpott v. Kelley*, (1835) 3 A. & E. 106

38. Demand and refusal are evidence of conversion.—This is a common saying and means that a demand and refusal are evidence of an adverse detention or withholding from the owner by the person in wrongful possession. But “every detention is not a conversion,”¹ and a refusal which is not really in denial of the owner’s right is not adverse and does not evidence a conversion, *e.g.*, where a warehouseman or carrier refuses to deliver to the owner before the latter pays the cost of warehousing or carriage or produces his documents of title.² If, however, no cost was due or he had no honest doubt about the title or imposed unreasonable conditions,³ his refusal is a hostile act and amounts to a conversion. If the refusal is unqualified and unambiguous it is conclusive evidence of conversion and is indeed the conversion itself.⁴ It is no excuse that the defendant made an honest mistake about the plaintiff’s title, as where he believed another to be the owner and took a sale or pledge from him; he refuses at his own risk or peril. In cases where the person in possession is pressed with conflicting claims his proper course is to file an interpleader action in which the rival claimants are made parties and their respective claims are determined by the court.⁵ A demand and refusal are, however, not even evidence of a conversion if the defendant has lost or never had possession of the goods.⁶ In spite of these limitations, this time-honoured maxim still survives in the law.

39. Older meaning of the above maxim.—It had originally a different meaning and purpose.⁷ In an earlier stage of the law, the term ‘conversion’ and the remedy known as the action of trover were confined only to taking and disposal; for mere detention the remedy was the action of ‘detinue.’ But on account of superior procedural

1. Channel, B. in *Burroughes v. Bayne*, above, at p. 303; *Isaack v. Clark*, (1614) 2 Bulstr. 306.

2. *Vaughan v. Watt*, (1840) 6 M. & W. 492 at p. 497; *Alexander v. Southey*, (1821) 5 B. & Ald. 247; *Pillott v. Wilkinson*, (1864) 3 H. & C. 345.

3. *Davies v. Vernon*, (1844) 6 Q.B. 443; *Cobbett v. Clutton*, (1826) 2 C. & P. 471; *Wetherman v. London & Liverpool Bank of Commerce*, (1914) 31 T.L.R. 20; *Nandlal v. Bank of Bombay*, (1909) 11 Bom.L.R. 925 (intent material); *Haryana Cotton Mills Co. v. B. B. and C. I. Ry. Co.*, (1927) I.L.R. 8 Lah. 555; *G. I. P. Ry. v. Radha Mal*, (1925) I.L.R. 47 All. 519; 23 A.L.J. 398; *Shamsul Haq v. Secretary of State for India*, (1929) I.L.R. 57 Cal. 1286.

4. Best, J. in *Alexander v. Southey*, (1821) 5 B. & Ald. 247 at p. 250; Holt, C. J. in *Baldwin v. Cole*, (1704) 6 Mod. 212.

5. *Robinson v. Jenkins*, (1890) 24 Q.B.D. 275; *Attenborough v. London and St. Katharine's Dock Co.*, (1873) 3 C.P.D. 450. As to the right of a bailee to refuse on the ground of a paramount claim, see *Sheridan v. New Quay Co.*, (1858) 4 C.B.N.S. 618; *European and Australian Mail Co. v. Royal Mail Packet Co.*, (1861) 30 L.J.C.P. 247; but he cannot do so if he took the bailment with notice of the claim, *Ex parte Davies*, (1882) 19 Ch. D. 86, 90. See also Indian Contract Act, ss. 166, 167.

6. *Wilbraham v. Snow*, (1669) 2 Wms. Saund. 47a; *Alexander v. Southey*, (1821) 5 B. & Ald. 247; *Verrall v. Robinson*, (1835) 2 C. M. & R. 495.

7. Salmond, Torts, pp. 307, 308; Holdsworth, Vol. VII, p. 410.

conveniences,¹ trover was more popular with pleaders than detinue and was used even for wrongful detention. This was done by the device of alleging a demand and refusal as evidence of conversion by disposal, in other words, by saying that the defendant's inability to return the goods was due to his having wrongfully parted with them already. This allegation was a mere fiction, because the defendant was not allowed to escape liability by pleading that he still had the goods and had not parted with them. In that way wrongful detention was remedied by the action of trover and regarded as a species of conversion. After forms of action were abolished and conversion became comprehensive in scope, there is no place for the old rule, but here as elsewhere in the law an old rule survives in a new form and bears the traces of its past history. The refusal was originally evidence of a disposal and is now evidence of an adverse detention.

40. Detention : Constructive detention.—There may be a constructive detention by estoppel or, as it is called, conversion by estoppel. When a person represents, though by honest mistake, that he is in possession of certain goods and induces another to act upon the representation to his own prejudice, he is estopped from denying that he has the goods and is considered to be in possession and wrongfully detaining the goods. In *Seton v. Lafone*,² A's goods were in the defendant's warehouse for safe custody but the defendant's servants by mistake delivered them to a stranger. In ignorance of this fact, the defendant represented to B, an intending purchaser from A, that the goods were in his possession and thereupon B purchased them and demanded delivery. It was held that the defendant was liable for conversion by estoppel.

41 Delivery.—An unauthorised delivery of the plaintiff's goods by the defendant to a third person is *prima facie* adverse to the plaintiff. The delivery may be actual or constructive.³ It may purport to be (i) a transfer of property, or (ii) a mere change of possession without affecting property.

42. Transfer of property.—If the delivery purports to affect or change the property, it is a clear act of deprivation of the owner's right by creating a hostile right in another person. The transfer may be of the full property, *e.g.*, a sale or gift, or of a limited or special property, *e.g.*, a pledge. If A is a bailee of B's goods and sells them, A is liable for conversion unless under the law or the terms of the contract he had a power to sell. For instance a pledgee may, if so empowered, create a sub-pledge,⁴ or sell on failure of the pledger to pay the debt.⁵ Otherwise his transfer

1. Below, para. 73.

2. (1887) 19 Q.B.D. 68; see also *Bristol and West of England Bank v. Midland Ry. Co.*, (1891) 2 Q.B. 653; *Henderson v. Williams*, (1895) 1 Q.B. 521.

3. *Van Oppen & Co. v. Tredgears*, (1918) 37 T.L.R. 504; the defendant claimed title to goods in possession of a firm to whom the plaintiffs' carriers had delivered them by mistake, and purported to sell them to the firm; he was held liable for conversion.

4. *Donald v. Suckling*, (1866) L.R. 1 Q.B. 585.

5. As to power of carriers and other bailees to sell in cases of urgency, see *Praeger v. Blatspiel Stamp and Heacock*, (1924) 1 K.B. 566.

would be a wrongful conversion for which he is liable.¹ The liability of a transferor may arise even in cases where he *bona fide* believed that he had a right to transfer. If for instance he had purchased a chattel from one who had no title to it, say a thief, he as well as his agent acting for him in effecting a transfer would be liable to the true owner and it is no defence that they acted in ignorance of the latter's title. This is illustrated by the leading case of *Hollins v. Fowler*.² The defendants, Messrs. Hollins & Co., were a firm of brokers. They purchased some bales of cotton from one Bayley without any knowledge of the fact that the cotton belonged not to him but to the plaintiffs, Fowler & Co., and sold it to Messrs. Micholls, a spinning company, who spun it into yarn. Bayley had got the goods from the plaintiffs pretending to act for a certain principal who did not exist. Therefore between the plaintiffs and Bayley there was really no contract at all and the title was still in the plaintiffs. It was held that the plaintiffs could recover the full value of the cotton from the defendants though the latter in ignorance of the plaintiffs' ownership had paid the price to Bayley, and though they acted only as brokers in the transaction of buying and resale to Messrs. Micholls. In view of the importance and difficulty of the question involved, the judges of the court of Queen's Bench were invited to state their opinion during the hearing of the case in the House of Lords and the opinion of Blackburn, J., afterwards Lord Blackburn, is the leading authority on the law relating to liability for conversion. He stated the principle thus³ :—

"The case against them (the defendants) does not rest on their having merely entered into a contract with Bayley, or merely having assisted in changing the custody of the goods, but on their having done both. They knowingly and intentionally assisted in transferring the dominion and property in the goods to Micholls, that Micholls might dispose of them as their own, and the plaintiffs never got them back. It is true they did it as brokers for Micholls, and not for any benefit for themselves; but that is not material."

The application of this principle is illustrated by the cases in the following four paragraphs.

43. Brokers and auctioneers.—Brokers⁴ and auctioneers⁵ have been held liable for selling and delivering goods to the purchaser without

1. *Mulliner v. Florence*, (1878) 3 Q.B.D. 484 (sale by an innkeeper of horses over which he had a lien was held a conversion); now innkeepers have a statutory right to realise their security; 41 and 42 Vict., c. 38, s. 2; *Cooverji v. Mawji*, 1937 Bom. 26 (pledgee selling before time).

2. (1875) L.R. 7 H.L. 757; (1872) L.R. 7 Q.B. 616; see also *Hiort v. Bott*, (1874) L.R. 9 Ex. 86; *Stephens v. Elwall*, (1815) 4 M. & S. 259.

3. (1875) L.R. 7 H.L. 757 at p. 769. See *Underwood, Ltd. v. Bank of Liverpool*, (1924) 1 K.B. 775 at p. 790, *per* Scrutton, L.J.

4. *Hollins v. Fowler*, above, para. 42; *Taylor v. Kymer*, (1832) 3 B. & Ad. 320; *Edelstein v. Schuler & Co.*, (1902) 2 K.B. 144.

5. *Consolidated Co. v. Curtis*, (1892) 1 Q.B. 495; *Cochrane v. Rymill*, (1870) 40 L.T. 744; *Barker v. Furlong*, (1891) 2 Ch. 172; *Hardman v. Booth*, (1863) 1 H. & C. 803. They may have a right of action against their employers for indemnity against such liability. *Adamson v. Jarvis*, (1837) 4 Bing. 66; *Betts v. Gibbins*, (1834) 2 A. & E. 57.

the real owner's authority and in ignorance of his title. But if a broker¹ or auctioneer² does not deliver possession actual or constructive or had no possession at all, but, for instance, merely settled a bargain between seller and buyer, he is not liable for conversion.

44. Sheriffs and bailiffs.—Sheriffs and bailiffs have been held liable for seizing and selling, even though by honest mistake, the goods of a person other than the judgment-debtor.³ They would not be liable if they acted under the authority of a warrant or order of court.⁴

45. Bankers.—Bankers have been held liable for collecting cheques on behalf of persons not entitled to them. This has been explained on the ground that the title to a cheque, *i.e.*, the piece of paper, is in the true owner and a banker who takes possession of it on behalf of a person not entitled to it and presents it for collection commits a conversion of the chattel.⁵ In the interests of trade and commerce a banker is protected by statutes like the Bills of Exchange Act⁶ in England and the Negotiable Instruments Act⁷ in India, in cases where he has in good faith and without negligence received payment for a crossed cheque for a customer. In cases not covered by this exception his liability for conversion would remain.⁸

46. Innocent agents making a transfer.—Even an innocent agent who on behalf of his principal effects a transfer and delivery of possession of the true owner's property will be liable. In *Stephens v. Elwall*⁹ the defendant was an agent who took delivery on behalf of a foreign principal who was the purchaser and sent the goods on to him. It turned out that the seller was a bankrupt and the assignee made a demand two years after the sale. The defendant was held liable though he acted in unavoidable ignorance and under his master's authority, because 'he intermeddled with the plaintiff's property and disposed of it.'

1. *Barker v. Furlong*, (1891) 2 Ch. 172.

2. *National Mercantile Bank v. Rymill*, (1881) 44 L.T. 767.

3. *Garland v. Carlisle*, (1837) 4 Cl. & F. 693; *Balme v. Hutton*, (1823) 9 Bing. 471; *Jelks v. Hayward*, (1905) 2 K. B. 460; above, Chap. IV, para. 37. In England protection is conferred on them by the Bankruptcy and Deeds of Arrangement Act, 1913 (3 & 4 Geo. V, c. 34, s. 15). 4. Judicial Officers' Protection Act (XVIII of 1850). Below, Chap. XVIII.

5. *Arnold v. The Cheque Bank*, (1876) 1 C.P.D. 578; *Fine Art Society, Ltd. v. Union Bank of London*, (1886) 17 Q.B.D. 705; *Kleinwort v. Comptoir National d'Escompte*, (1894) 2 Q.B. 157; *Morison v. London & County Westminster Bank, Ltd.*, (1914) 3 K.B. 356; *Underwood, Ltd. v. Bank of Liverpool*, (1924) 1 K.B. 775; *Ram Lal v. Dass Bank*, I.L.R. 1943 Cal. 15. 6. S. 82. 7. S. 131.

8. *Savory & Co. v. Lloyds Bank*, (1932) 2 K.B. 122; *Midland Bank, Ltd. v. Reckitt*, (1933) A.C. 1; *Carpenters Co. v. Brit. Mutual Banking Co.*, (1938) 1 K.B. 511; *Bhagvan Das v. Cret*, (1903) I.L.R. 31 Cal. 249; *Thorappa v. Umedmalji*, (1923) 25 Bom. L.R. 604; 1924 Bom. 205; *Robinson v. Central Bank of India*, (1931) I.L.R. 9 Rang. 583.

9. (1815) 4 M. & S. 259; see also *Winter v. Banks*, (1901) 84 L.T. 504; *Mehra v. Sutton*, (1913) 109 L.T. 529.

47. A mere change of possession.—The ordinary rule is that a delivery of possession of another's goods without his authority to a third person is *prima facie* adverse to his rights. Therefore the person who delivers will be liable for conversion. Thus a bailee, agent or servant who delivers the goods of his bailor or employer without the latter's authority to a third person is liable to him for conversion,¹ e.g., a carrier or warehouseman making a delivery by mistake to the wrong person. Where the contract was not one of bailment but only a license as where a person parked his car in another's ground on the terms that the latter would not be liable for loss or injury to the car, the loss of the car by the latter or his servant parting with it to a third person by mistake would not be a conversion.² An agent or servant who on behalf of his principal or employer intermeddles with the goods of another will also be liable to the latter.³ But a delivery or other intermeddling by an innocent agent or servant is not a conversion if it is made in pursuance of the orders of a person who is apparent owner and in ignorance of his want of title and is merely a "ministerial dealing with goods."⁴ Lord Blackburn stated the principle thus in *Hollins v. Fowler*⁵ :—

"I cannot find it anywhere distinctly laid down, but I submit to your Lordships that on principle, one who deals with goods at the request of the person who has the actual custody of them, in the *bona fide* belief that the custodian is the true owner, or has the authority of the true owner, should be excused for what he does if the act is of such a nature as would be excused if done by the authority of the person in possession, if he was a finder of the goods, or intrusted with their custody. I do not mean to say that this is the extreme limit of the excuse, but it is a principle that will embrace most of the cases which have been suggested as difficulties."

Thus if *A* sends *B*'s goods through *A*'s servant to *C*, *B* cannot sue *A*'s servant for conversion. If, however, the servant knows he is taking part in an unauthorised transfer of *B*'s goods to *C*, he is liable along with his master to the real owner of the goods.

48. Application of Lord Blackburn's formula.—According to the above test, the following persons will not be liable :—

(a) a servant or agent who merely delivers goods in accordance with the orders of his master in possession as apparent owner and has no notice of any transfer of property being effected thereby ;

1. *Stephenson v. Hort*, (1828) 4 Bing. 476; *Hort v. Bott*, (1874) L.R. 9 Ex. 86; *Union Credit Bank, Ltd. v. Mersey Docks and Harbour Board*, (1899) 2 Q.B. 205; *Heugh v. London & N. W. Ry. Co.*, (1879) L.R. 5 Ex. 51; *Hort v. London & N. W. Ry. Co.*, (1879) 4 Ex. D. 188; see also *Glyn Mills & Co. v. East & West India Dock Co.*, (1880) 7 A.C. 591; *Jebara v. Ottoman Bank*, (1927) 2 K.B. 254, reversed on other grounds in (1928) A.C. 269 (where the bailee's mandate had ceased owing to the war.)

2. *Ashby v. Tolhurst*, (1937) 2 A.E.R. 837.

3. *Stephens v. Elwall*, (1815) 4 M. & S. 259; above, para. 46.

4. L. R. 7 H.L. at pp. 767, 768.

5. L. R. 7 H.L. at p. 766.

(b) a carrier, like a Railway Company who carries goods or delivers them under the orders of such a person to the consignee and has no notice of any transfer of property being caused thereby¹ ;

(c) a bailee like a warehouseman who takes goods for safe custody and re-delivers them to his bailor before the real owner makes a demand on the bailee² ;

(d) a finder of goods who delivers them to a person who is not their owner but whom he reasonably believes to be the true owner. The position of an involuntary bailee is similar and is illustrated by an interesting case which recently arose in England.³ The plaintiffs *E* and *P*, a firm dealing in mantles and macintoshes, were induced by the fraud of a certain person to send coats to the value of £ 350 to a firm *P*. After the goods left *E* and *P*, he sent a telegram to the firm *P* in the name of *E* and *P* saying that goods were wrongly sent to firm *P* and a van was sent to collect them. Then a man with a trade card of *E* and *P* went to *P* and took the goods in a van. It was held that the firm of *P* having delivered the goods after enquiry were not liable to the firm of *E* and *P*. A finder is of course not liable for keeping the goods pending discovery of their owner, either with himself or with a servant or bailee for safe custody. In all these cases a refusal to deliver to the true owner or a dealing with the goods after demand will amount to conversion.

49. Liability of a transferee or deliverer.—In considering the liability of a person who receives possession of a chattel from another by way of transfer or otherwise without the authority of the true owner, we have to exclude cases where he acquires title by the mere delivery notwithstanding the want of title of his transferor. The ordinary rule is that a transferee does not get a better title than his transferor.⁴ Therefore if *A* transfers or delivers *B*'s goods without *B*'s authority to *C*, the title in the goods continues in *B* who can pursue the specific property in the hands of *C*. But *B* cannot do so in the case of current coin or money in which property passes by delivery.⁵ Though *B* cannot sue *C* for conversion of the specific chattel, he may still have other remedies for recovery of an equivalent sum of money. Again under the law merchant

1. *Fowler v. Hollins*, (1872) L.R. 7 Q.B. 616 at 632; *Sheridan v. The New Quay Co.*, (1858) 4 C.B. (N.S.) 618, 650; *Nippon v. Mahaliram*, (1930) 52 C.L.J. 365, 399; 1931 Cal. 269; as to a packer, see *Greenway v. Fisher*, (1824) 1 C. & P. 190.

2. *Union Credit Bank v. Mersey Docks and Harbour Board*, (1899) 2 Q.B. 205, 216.

3. *Elvin & Powell, Ltd. v. Plummer Roddis, Ltd.*, (1935) 50 T.L.R. 158

4. *Cundy v. Lindsay*, (1878) 3 A.C. 459; *Ellis v. John Stenning & Son*, (1932) 2 Ch. 81; *Bushell v. Timson*, (1934) 2 K.B. 79 (purchaser in irregular execution); in India ss. 27 to 29 of the Sale of Goods Act III of 1930.

5. *R. v. Joggesur*, (1878) 1 L.R. 3 Cal. 379; *Agand Mahto v. Khajah Atifullah*, (1907) 11 C.W.N. 862; *Sankunni Menon v. Govinda Menon*, (1912) 1 L.R. 37 Mad. 381; 22 M.L.J. 485; *In re Pandharinath*, (1915) 1 L.R. 40 Bom. 186; 17 Bom L.R. 922; see however *Benares Bank, Ltd. v. Ram Prasad*, 1930 All. 573; 1930 A.L.J. 1153.

as enacted by the Bills of Exchange Act in England and the Negotiable Instruments Act in India, title passes by delivery to holders in due course of bills of exchange or cheques. Under the Sale of Goods Acts in India¹ and in England² there are other exceptions to the above rule recognised in the interests of trade and business. For instance a purchaser from a mercantile agent in possession of the goods sold or a document of title like a bill of lading with the owner's consent would get a good title if he acted in good faith and without notice of the owner's title. The Indian Contract Act³ enacts a similar rule in the case of a pledgee from a mercantile agent. If a case does not fall within these exceptions, the true owner can sue the person in possession for recovery of his property. He can also sue for conversion if the latter took possession with knowledge of the true owner's title. Indeed in such a case the latter is really a joint wrongdoer with his transferor and is liable without a demand. If he received possession *bona fide* from another who was apparent owner, he would, in the absence of any conversionary act like disposal or destruction, be liable ordinarily only on demand and refusal. This is the view of the English authorities,⁴ but the question whether he is liable before demand is rarely material except for purposes of applying the law of limitation. In England the period of limitation (six years) starts from the cause of action.⁵ Therefore it has been held that time will run only from demand and refusal and not the mere receipt of possession.⁶ In India, however, Article 48 of the Limitation Act is differently worded.⁷ It speaks of an action for specific movable property lost or acquired by conversion, or for compensation for wrongfully taking or detaining the same and provides for it a period of three years from the time when the plaintiff first learns in whose possession his property is.⁸ This seems to suggest that the plaintiff has a cause of action

1. Ss. 27-29.

2. Sale of Goods Act, 1893 (56 & 57 Vict., c. 71), ss. 21-25; Factors Act, 1889 (52 & 53 Vict., c. 45), s. 2. See *Lloyds Bank v. Bank of America National Trust and Saving Association*, (1937) 2 K.B. 631.

3. S. 178. See *Mercantile Bank of India v. Central Bank of India*, I.L.R. (1938) Mad. 360 P.C.

4. Above, paras. 34 and 36.

5. 21 Jac. 1, c. 16, s. 3.

6. Above, para. 34, note 4. If there was an independent act of conversion, e.g., by disposal, the plaintiff cannot wait till demand; *Granger v. George*, (1826) 5 B. & C. 149; *Betts v. Metropolitan Police*, (1932) 2 K.B. 595. As to a case of 'concealed fraud', see *Wilkinson v. Verity*, (1871) L.R. 6 C.P. 206.

7. This article applies to conversion, honest as well as dishonest; *Lewis Pugh v. Ashutosh Sen*, (1929) I.L.R. 8 Pat. 516; 56 I.A. 98 (P.C.); *Adaji Coal Co. v. Pannalal Ghose*, (1930) I.L.R. 57 Cal. 1341; 57 I.A. 144 (P.C.).

8. Art. 49 which applies to suits for movable property acquired otherwise than by conversion and for compensation for injuring or detaining the same, makes the unlawful detention or possession the starting point, as in the case of a bailee refusing to redeliver; *Gopalaswami v. Subramania*, (1911) I.L.R. 35 Mad. 636; 22 M.L.J. 152; *Narayanarwamy Tevar v. Aiyasamy*, (1912) 24 M.L.J. 184; 18 I.C. 921; *Mt. Laddo Begam v. Jamaluddin*, (1919) I.L.R. 42 Mad. 45; *Bhupendra v. Goonendra*, (1928) 32 C.W.N. 133; 1929 Cal. 42; *Ma Mary v. Ma Hla Win*, (1925) I.L.R. 2 Rang. 555. As to the difference between arts 48 and 49, see *Kripa Ram v. Kunwar Bahadur*, (1932) I.L.R. 54 All. 467; 1932 A.L.J. 241.

for recovery of property on knowledge and before demand.¹ The American Restatement makes it a conversion for any person to receive possession in consummation of a transaction negotiated by him to acquire a proprietary interest in the chattel either for himself or for his principal.²

50. Sale in market overt.—Ordinarily a mere bargain and sale without transfer of possession is not a conversion. This is so because the transaction affects neither the possession nor the title, as, *ex hypothesi*, the transferor had not the title. But in England a sale in 'market overt' operates to transfer the title.³ It means an open sale in any lawfully constituted market and by a special custom a sale in any shop in the city of London between sunrise and sunset, of goods of the kind which are usually put up for sale therein.⁴ The vendor is liable for an unauthorised sale of another's goods in market overt, as he thereby divests the owner of his title.⁵ As the purchaser acquires the title he cannot be sued for conversion. There is no similar rule in India.

51. Destruction.—The unauthorised destruction by a person of another's goods is a deprivation or conversion. Here destruction is used in a large sense and includes not merely a wanton act of mischief, *e.g.*, killing an animal or injuring or throwing away a chattel, but also causing disappearance of a chattel in any manner, *e.g.*, drinking up wine, and change of form or identity, *e.g.*, making grapes into wine, cotton into yarn, marble into statue, adulterating an article by mixture. But it must be an adverse exercise of dominion. An injury due to neglect or accident is not a conversion though it may be actionable negligence or a breach of contract.⁶ The owner should also be deprived of the possession of the goods. Therefore if A shot B's deer in B's park there is no conversion but only a trespass, but if he took the deer away there is a conversion. A wilful act of destruction is inconsistent with the true owner's rights, and amounts to a conversion though the wrongdoer was ignorant of the owner's title.⁷ It is ordinarily no excuse that he did it under another's

1. But if he wants compensation, he has to show a wrongful detention which would imply a demand and refusal; *Seshappier v. Subramania Chettiar*, (1916) 40 Mad. 678 : 30 M.L.J. 587. 2. §§ 223, 229. 3. Sale of Goods Act, 56 and 57 Vict., c. 71, s. 22.

4. See *Hargreave v. Spink*, (1892) 1 K. B. 25; *Clayton v. Le Roy*, (1911) 2 K. B. 1031.

5. *Delaney v. Wallis*, (1885) 14 L. R. Ir. 31; *Farrar v. Berwick*, (1836) 1 M. & W. 682 at p. 688, *per* Parke, B.; *Peer v. Humphrey*, (1835) 2 A. & E. 495.

6. *Lilley v. Doubleday*, (1881) 7 Q. B. D. 510.

7. *Lancashire and Yorkshire Ry. Co. v. MacNicol*, (1919) 88 L. J. K. B. 601; the defendant received some drums of carbolic acid wrongly delivered to him by the plaintiffs, a railway company; he said he mistook them for certain cases of creosote consigned to him and poured the contents of the drums into his tank. The plaintiffs had to pay their value to the real consignee and were held entitled to recover it from the defendant, as by using up the goods, he committed a conversion.

orders. But if he was an innocent agent or servant, the position is not quite clear. In the case of *Hollins v. Fowler*, Lord Blackburn observed that the spinning company, viz., Messrs. Micholls who bought the cotton from the defendant and spun it into yarn would have been liable if sued. What about the workmen in their factory who did the spinning? In his judgment he recognised that it would be hard to make them liable and that the exception in the form in which he stated it¹ would not cover their case. But he observed that if ever such a question came before him, he would endeavour to answer it and that it was not necessary to do so in that case.² It is submitted that they could not have been sued for the same reason that a servant handling goods according to the orders of his employer in possession as apparent owner or a bailee redelivering goods to his bailor cannot be sued.³ The difficulty does not arise under the definition of conversion by destruction adopted in the American Restatement, viz., "intentionally destroying or altering a chattel in the actor's possession."⁴ Even if innocent agents are held liable, the injustice can be mitigated by allowing them a right of indemnity against their employer.

52. Unauthorised user.—There is no definite authority on the question whether a mere unauthorised user by a person of another's chattel without any wrongful taking, refusal or destruction is a conversion. It may amount to a breach of contract, e.g., a bailee's use of goods bailed which is not in accordance with the conditions of the bailment.⁵ If a purchaser of a horse or jewel from a person who was not the owner used it as his own by riding the horse or wearing the jewel, is he liable for conversion before demand by the owner⁶? If he was aware of the vendor's want of title at the time of the purchase, his liability would appear clear. Even in cases of *bona fide* mistake it would seem that his user would in law be a conversion as it purports to be an exercise of dominion over the chattel.⁷

53. Conversion between co-owners.—Since each co-owner is entitled to exercise dominion over the chattel there can be no conversion unless the act of a co-owner amounts to an ouster of another co-owner, e.g., total destruction, sale in market overt having the effect of completely divesting

1. Above, para. 47.

2. (1875) L. R. 7 H. L. 757 at p. 768.

3. Pollock, Torts, p. 290; Street, Vol. I, p. 243.

4. Sec. 223.

5. Indian Contract Act, s. 154.

6. See the early case of *Mulgrave v. Ogden*, (1590) Cro. Eliz. 219; Walmesley, J. said, "If a man find my garments and suffereth them to be eaten with moths by the negligent keeping of them, no action lieth; but if he weareth my garments, it is otherwise, for wearing is a conversion"; Holdsworth, VII, p. 406.7. *Lancashire & Yorkshire Ry. Co. v. MacNicol*, (1919) 88 L.J.K.B. 601, 605. Cf. *The Nordburg*, (1939) 1 A.E.R. 70 C.A.

title and possession.¹ A mere user or disposal will not be conversion as a co-owner can use or part with the property to the extent of his interest.²

54. Principles of liability.—The liability for conversion depends on the character of the act, *viz.*, its being an interference with the owner's right of dominion. It is unnecessary to prove an intent to deprive, nor is the absence of such intent any excuse. It is also unnecessary to prove negligence. In many of the cases of *bona fide* dealing or delivery by bankers, auctioneers, carriers, etc., there is likely to be some element of want of due care; and the standard of care would be commensurate with the risk involved in the act. But there may still remain some cases where absence of negligence is no excuse and the liability is in effect absolute. While in the case of a mere trespass to goods, the liability would generally depend, as we have seen, on some wilful or negligent act, a trespass which amounts to a dispossession is in law a conversion and governed by a more strict rule of liability. It is also worth noticing that the law of trespass and ejectment in regard to immovable property does not involve the stringent liability or the hardships of the law of conversion of goods illustrated by cases like *Hollins v. Fowler*.³ The reason is that though the policy of the law in either case is the same, *viz.*, protection of the right of property, it presents peculiar difficulties in its application to movable property. Goods unlike land are easily transferred from hand to hand and capable of being abstracted or lost for ever. The law has to choose between two evils and has chosen that of throwing the loss on the innocent intermeddler rather than on the innocent owner. The only exceptions are, first, when the owner has, by his own voluntary act, brought about the loss, and second, when the interests of trade and commerce override the claims of ownership, as in the case of *bona fide* holders of negotiable instruments.

55. Defences.—Some special defences may be briefly noticed here :

- (i) authority of party, *e.g.*, a bailment or sale by the owner ;
- (ii) authority of law ;
 - (a) distress, *e.g.*, by a landlord of his tenant's goods for arrears of rent ;
 - (b) execution of legal process *e.g.*, warrant of attachment of the goods of a judgment-debtor ;
 - (c) distress *damage feasant*⁴ ;

1. *Per Parke, B.*, in *Farrar v. Berwick*, (1836) 1 M. & W. at p. 688; *Morgan v. Marquis*, (1854) 9 Ex. at p. 148.

2. *Jacobs v. Seward*, (1872) L.R. 5 H.L. 464; *Harsukh v. Darshan*, (1931) I.L.R. 13 Lah. 555; see also *Nyberg v. Handelsaar*, (1892) 2 Q. B. 202; *Farrar v. Berwick*, (1836) 1 M. & W. 682.

3. (1875) L.R. 7 H. L. 757.

4. Above, Chap. IV, para. 44.

(d) recaption by the owner. He can use the necessary force for retaking his goods ;

(e) lien,¹ e.g., lien of a solicitor, carrier, vendor. In England innkeepers have a lien for their dues on the customer's goods ;

(f) a vendor's right of stoppage in transit² ;

(g) abatement of nuisance ; e.g., cutting of overhanging trees.

But this is no excuse for taking away the fruits³ ;

(iii) estoppel.⁴ The owner of property may by his conduct have misled the defendant into doing something, e.g., parting with it, and cannot then complain of conversion.⁵

56. Remedies : Extra-judicial. Recaption.—This has already been noticed.⁶

57. Remedies : Judicial.—(a) Action for damages ; (b) Action for specific restitution ; (c) Action for money had and received ; and (d) Action of replevin.

58. Action for damages.—In the action for conversion, formerly called action of trover, the primary relief is damages. The ordinary measure of damages is the value of the goods and any special damage directly resulting from the conversion.⁷

59. Value of the goods.—The value of the goods is usually fixed at their market price. If they have no market their value will have to be ascertained from the circumstances. In *Hall, Ltd. v. Barclay*,⁸ the defendants, a firm of manufacturers, did work for a person in erecting and testing certain davits which he had invented. The davits were then dismantled by the defendants who kept them for many years and finally sold them as scrap iron. Their owner claimed them afterwards and was awarded the cost of making or replacing them as there was no market for them. In the Court of Appeal, Greer, L. J., observed that there were two rules for ascertaining the damage :⁹

“ The first is this : A plaintiff who is suffering from a wrong committed by a defendant is entitled, so far as money can do it, to be put into the same position as if he had

1. Indian Contract Act, ss. 170 and 171 ; Indian Sale of Goods Act, sec. 47 ; see *Donald v. Suckling*, (1866) L.R. 1 Q.B. 585 for distinction between lien and pledge.

2. Indian Sale of Goods Act, sec. 50. 3. *Mills v. Brooker*, (1919) 1 K.B. 555.

4. *Mercantile Bank of India v. Central Bank of India*, I.L.R. (1938) Mad. 260 ; 1938 P.C. 52.

5. *Commonwealth Trust, Ltd. v. Akotey*, (1926) A.C. 72 ; see also *Union Credit Bank v. Mersey Docks*, (1899) 2 Q.B. 205 ; cf. *Farguharson v. King & Co.*, (1902) A.C. 325 ; *Lancashire and Yorkshire Ry. Co. v. MacNicol*, (1918) 88 L.J.K.B. 601, 605 ; *Greenwood v. Martins Bank*, (1933) A.C. 51.

6. Above, para. 17 ; Chap. IV, para. 35.

7. *Re Simms, Ltd.*, (1934) Ch. 1.

8. (1937) 3 A.E.R. 620.

9. (1937) 3 A.E.R. at p. 623.

not suffered that wrong. That is what is referred to as *restitutio in integrum*. The second principle which is accepted is that what he is entitled to, as damages for conversion or detention in respect of the article so detained or converted and not returned, is the value of that article."

The principle of *restitutio in integrum* has been spoken of as a general rule applicable to actions for breaches of contract and torts.¹ It is however usually applied in the sphere of tort only in cases of injuries to property,² especially collisions of ships.³ It has obviously no application to a large number of torts like injuries to person, reputation or family relations. In these cases no sum of money can restore the injured party to his original condition.⁴ Even in the case of breaches of contract and injuries to property⁵ the principle has only a limited application. Thus in *The Arpad*⁶, the plaintiff, a consignee of wheat from Germany in the defendants' ship, claimed in an action for conversion and for breach of contract by short delivery the difference between the market price on the date of delivery and the price at which he had contracted some months before to sell the wheat. This claim was not allowed and he was awarded only the difference between the market price and the price at which he had purchased the wheat. Therefore the principle of *restitutio in integrum* is at best only a very general rule which in its actual application is subject to important limitations. The following are some illustrations of different modes of valuation.

60. Illustrations of valuation.—In cases of detention of title-deeds, the full value of the estate to which they belonged is awarded by way of damages which are, however, reduced to 40s. on the deeds being given up.⁷ In the case of negotiable instruments their full value will be recovered.⁸ The value of currency notes is usually their face value but there may be exceptional cases where this rule is not applicable. For instance, when currency notes stored in a cellar by an authority like the Bank of England or the Government of India which issues them are destroyed wilfully or negligently by a wrongdoer, the damages may represent only the cost of

1. *Livingstone v. Rawyards Coal Co.*, (1880) L.R. 5 A.C. 25 at p. 39, *per* Lord Blackburn; Mayne, *Damages* (10th ed.), p. 9. 2. *The Arpad*, (1934) P. 189.

3. *The Kate*, (1899) P. 165; *The Edison*, (1933) A.C. at p. 459, *per* Lord Wright; (1932) P. at p. 67, *per* Scrutton, L.J.; above, para. 18.

4. *Admiralty Commissioners v. Valeria*, (1922) 2 A.C. 242 at p. 248, *per* Lord Dunedin. See also *The Mediana*, (1900) A.C. 113 at p. 116, *per* Lord Halsbury.

5. *Cf.* Chap. IV, para. 48.

6. (1934) P. 189.

7. *Loosemore v. Radford*, (1842) 9 M. & W. 657; *Coombe v. Sansom*, (1822) 1 Dowl. & Ry. 201.

8. *Delegal v. Naylor*, (1831) 7 Bing. 460; *Morison v. London County and Westminster Bank*, (1914) 3 K.B. 356, 365; *Lloyds Bank v. Chartered Bank of India*, (1929) 1 K.B. 40 (damages reduced by proceeds of fraudulent cheques got back by the plaintiff); *Shivaprasad v. Prayagkumari*, (1933) L.L.R. 61 Cal. 711; as to a letter, see *Thurston v. Charles*, (1905) 21 T.L.R. 659.

paper and printing of the notes.¹ The great difficulty that may sometimes arise in valuing a chattel is illustrated by some copyright cases. In *Ash v. Dickie*² the plaintiff complained that the copyright in his book on dogs was infringed by a series of articles in an illustrated paper called *The Daily Sketch*. He claimed damages for infringement and for conversion of the infringing copies. On the latter head the defendants' contention, which the Master had indeed allowed, was that the plaintiff was entitled to no more than the pulp value of the infringing part of the issues of the paper, estimated at 10%. This was assessment of damages by weight and not by value. The plaintiff claimed the proportionate price of all the issues of the paper. The Court of Appeal rejected the defendants' valuation but regarded the plaintiff's as a basis though not a conclusive one, as the selling value of the paper may in many cases not depend on the articles in question. The Court of Appeal awarded 100% as a rough estimate of the value of the infringing matter. Where a chattel is wrongfully detained by the defendant and not produced for assessment of value, the court will make every presumption against him and put the highest value on it. In *Armory v. Delamirie*³ the defendant returned only the socket of the jewel in his possession and not the precious stone in it; and he was ordered to pay the value of the most valuable jewel of that size.

61. Value at the time and place of conversion.—The value of the chattel is ascertained generally as at the time and place of conversion.⁴ But this rule is not a rigid one and must be interpreted in the light of the circumstances of each case. For instance in a case of trover for East India Company's warrants for cotton, the cotton was worth 6d. per lb. at the time of conversion and 10½d. per lb. at the time of trial and it was held that the later value should be awarded because the plaintiff might have had a good opportunity of selling the goods if they had not been detained.⁵ When logs of timber felled in a forest in Burma were wrongfully taken away, their price in Rangoon where they were usually sold *minus* the carrying

1. *Banco De Portugal v. Waterlow & Sons, Ltd.*, (1932) A. C. 452, 478, per Lord Sankey, L. C.

2. (1936) Ch. 655. See also *Birn Bros. v. Keene & Co.*, (1918) 2 Ch. 281; *John Lane The Bodley Head, Ltd. v. Associated Newspapers, Ltd.*, (1936) 1 K. B. 715; *Sutherland Publishing Co. v. Caxton Publishing Co. (No. 2)*, (1938) 1 Ch. 174.

3. (1721) 1 Stra. 505; Sm. L. C., Vol. I, p. 393; above, para 26. See *Sitaram v. Iswari Charan*, 1934 Pat. 492 (a case of wrongful mixture).

4. *Mercer v. Jones*, (1813) 3 Camp. 477; Civil Procedure Act, 1833, 3 and 4 Will. 4, c. 42, s. 29; *Alliance Bank v. Ghamandi*, (1927) I.L.R. 8 Lah. 373; *Shivaprasad v. Prayagkumari*, (1933) I.L.R. 61 Cal. 711. The same rule applies in an action for causing injury to goods; *Rogers Shellac Co. v. John King & Co.*, (1925) 1 L.R. 53 Cal. 239.

5. *Greening v. Wilkinson*, (1825) 1 C. & P. 625; see also *Mercer v. Jones*, above; *Ewbank v. Nutting*, (1849) 7 C.B. 797, 808, 811; *Reid v. Fairbanks*, (1853) 13 C.B. 692; *Sarareddi v. Brahmayya*, (1928) 55 M.L.J. 586: 1928 Mad. 1152.

charges was considered as the proper compensation.¹ In cases of fluctuation of value in a rising market the plaintiff may claim the higher value after the date of conversion.²

62. Change of form or value by the defendant.—The usual rule is that the value of the article in its original form will be awarded, e.g., cotton spun by the defendant into yarn. But in cases of minerals wrongfully severed and carried by the defendant the court would award the value of the article not as part of the soil, but as at the pit's mouth and does not allow any deduction to him for cost of severance or carriage, except when the defendant acted under a *bona fide* mistake.³ The same rule was applied in a case of wrongful felling of timber.⁴ In a Calcutta case⁵ the defendants, brokers, bought tea from a person who trespassed into the plaintiff's tea-garden, plucked the tea leaves and manufactured them into tea. They were held liable for the market price of the tea without any deduction of the cost of plucking and manufacture as well as transport of the tea to the defendants, because they were found to have been negligent, if not indeed partisan, in their conduct.

63. Full value of the goods.—The ordinary measure of damages is the full value of the goods.⁶ This is the rule whether the plaintiff in the suit is the full owner or only a bailee, finder, or trespasser, because the person in possession is treated as owner against all the world but the true owner. A bailee cannot get the full value against his bailor but can only get the value of his interest.⁷ But as against a stranger either the bailor or bailee can get the full value which will be dealt with as between them according to their respective interests.⁸ In the case of *The Winkfield*⁹ the Postmaster-General sued for damages for the loss of mails due to a

1. *Burma Trading Corporation v. Mirza Mohamed*, (1878) 1 L. R. 4 Cal. 116 (P.C.): 5 I.A. 130.

2. *Greening v. Wilkinson*, (1825) 1 C. & P. 625; *Sara Reddi v. Brahmayya*, above; 55 M. L. J. (Jour.) 91.

3. *Wood v. Morewood*, (1841) 3 Q. B. 440; see above, Chap. IV. para. 47; see also *Peruvian Guano Co. v. Dreyfus Bros.*, (1892) A. C. 166.

4. *Glenwood Rubber Co. v. Phillips*, (1904) A. C. 405.

5. *Carritt Moran & Co. v. M. N. Mukherjee*, I.L.R. (1941) 1 Cal. 285; 1941 Cal. 691.

6. *Johnson v. Lancashire & Yorkshire Ry. Co.*, (1878) 3 C. P. D. 499; *Nippon v. Mahaliram*, (1930) 52 C. L. J. 365; 1931 Cal. 269 (full value to bailee).

7. *Turner v. Hurdcastle*, (1862) 11 C. B. N. S. 683; *Waters v. Monarch Assurance Co.*, (1856) 25 L. J. Q. B. 102; *Brierley v. Kendall*, (1852) 17 Q. B. 937.

8. Indian Contract Act, ss. 180, 181. See *Pauline v. Cassamalai*, 1933 Bom. 465; 35 Bom. L. R. 1007 (a hire-purchaser can sue).

9. (1902) P. 42; approved by the P. C. in *Glenwood Lumber Co. v. Phillips*, (1904) A. C. 405; and *Eastern Construction Co. v. National Trust*, (1914) A. C. 197 at p. 210.

collision of ships caused by the negligence of the defendants. The defendants contended that as the plaintiff was not legally answerable to the owner for the loss he had no right to sue. This contention was rejected and it was held that the plaintiff could recover the full value.

64. Older theories about the bailee's right.—The decision in *The Winkfield* set at rest certain theories about the bailee's position which had the support of judicial and juristic authority for a long time.¹ One view was that he could sue because he represented the bailor. This is not historically correct because originally the bailee was the only person who could sue in trespass and the bailor could not sue at all. It was only afterwards that the bailor in certain cases, *e.g.*, bailments at will, was also allowed to sue. Another view was that the bailee was allowed to sue and get the full value because he was liable over to the bailor for the loss of the chattel bailed. This rested on the theory that a bailee was absolutely liable to account to the bailor for the loss of the goods bailed, but we will see later that this theory of liability, even if it once prevailed, was long ago departed from in the famous case of *Cuggs v. Bernard*.² It was also usual to support this theory by reversing the argument and saying that a bailee was liable to the bailor because he alone could sue a stranger for the loss. In *The Winkfield*³ it was held that the true basis of the bailee's right to sue in trespass and trover was his position as the person in possession and had no reference to his liability to the bailor. But when once the bailee recovers damages, he will hold them as trustee for the bailor also to the extent of the latter's right. This principle was applied in that case to an action by the bailee against a stranger for damages for negligence.

65. Value of the plaintiff's interest and not full value.—When the defendant also has an interest in the property, the plaintiff cannot recover the full value but only the value of his own interest as between the parties. A bailee cannot recover the full value against the bailor; nor can the bailor against the bailee, *e.g.*, a pledgee selling prematurely.⁴ In *Chinery v. Viall*⁵ the vendor who had custody of the goods resold them and the vendee who had not paid the price was awarded not the full value but only the actual loss sustained by him. That is what he would have got if he had sued for breach of contract instead of in trover. *Bramwell, B.*

1. See Holdsworth, Vol. VII, pp. 432, 450; Holmes, Common Law, p. 165.

2. (1703) 2 Ld. Raym, 909; below, Chap. XIV, para. 61.

3. (1902) P. at pp. 60, 61.

4. *Cooverji v. Mawji*, 1937 Bom. 26.

5. (1860) 5 H. & N. 238; see also *Belsine Motor Supply Co. v. Cox*, (1914) 1 K.B. 244; *Halliday v. Holgate*, (1868) L.R. 3 Ex. 299; it is otherwise if an unpaid vendor seizes the goods in the hands of the vendee; *Gillard v. Brittan*, (1841) 8 M. & W. 575; *Churchill v. Whetnall*, (1918) 87 L.J. (Ch.) 524. See *Cooverji v. Mawji*, (1936) 38 Bom. L.R. 984 (pawnor complaining of improper sale by pawnee).

observed that "a man cannot by merely changing the form of action entitle himself to recover damages greater than the amount to which he is in law entitled, according to the true facts of the case and the real nature of the transaction." Where the hirer of a piano under a hire-purchase agreement sold it, the owner was held entitled only to the balance of the instalments and not the value of the piano.¹ Where the vendor of a car on a hire-purchase system wrongfully resold the car, the purchaser was allowed to recover the sale-proceeds *minus* the instalments remaining payable by him.²

66. Special damage.—The plaintiff may get compensation for any special damage which is the necessary consequence of the conversion.³ He may also be awarded interest on the money lost.⁴

67. Exemplary damages.—They are not awarded for conversion except when the act is also a trespass and is attended with aggravating circumstances. This is a point of distinction between the actions of trespass and conversion.⁵

68. Nominal damages.—They are awarded when there has been no loss,⁶ *e.g.*, when the goods have been returned before or after suit.⁷ But substantial damages will be awarded if the goods had been injured by the defendant's act or had fallen in value when they were returned.⁸

69. Effect of payment of damages.—A judgment in trover followed by full satisfaction changes the title in the property and vests it in the defendant.⁹ In other words the result is a compulsory purchase by him. Thereafter the plaintiff cannot sue another for conversion or retake the goods. But a mere judgment for damages has not that effect.¹⁰

70. Specific restitution.—In England this remedy was usually obtained in the action of detinue. This action though largely superseded by trover, is still used¹¹ for recovery of specific property, usually title-deeds,

1. *Whiteley v. Hill*, (1918) 2 K.B. 808.

2. *Bhimji v. Bombay Trust Corporation*, (1929) I.L.R. 55 Bom. 381.

3. *France v. Gaudet*, (1871) L.R. 6 Q.B. 199; *The Arpad*, (1934) P. 189; *Re Simms*, *Ltd.*, (1934) Ch. 1.

4. *Paine v. Pritchard*, (1827) 2 C. & P. 538.

5. See *The Mediana*, (1900) A.C. 113 at 117, 118.

6. See *Hiert v. L & N. W. Ry. Co.*, (1879) 4 Ex. D. 188.

7. *Evans v. Lewis*, (1835) 3 Dowl. 819.

8. *Solloway v. McLaughlin*, (1938) A. C. 247.

9. *Brinsmead v. Harrison*, (1871) L. R. 6 C. P. 584.

10. *Brinsmead v. Harrison*, above; *Bradley v. Ramsay*, (1912) 106 L. T. 771; *Ellis v. Noakes*, (1932) 2 Ch. 98n.; *Sinnam Chetty v. Alagiri Iyer*, (1923) I. L. R. 46 Mad. 852 F. B. : 45 M. L. J. 516.

11. Especially after the abolition in 1833 of the 'wager of law' which accounted for the unpopularity of the action; below, para. 73. For an Indian case speaking of detinue, see *Sinnam Chetty v. Alagiri Iyer*, above.

from a person in possession without any hostile assertion of title. Formerly in the action of detinue the defendant was ordered to return the goods to the plaintiff or on default to pay its value, and the option was with the defendant to return them or not. In 1854,¹ the courts in England were empowered to compel specific restitution by seizure of the chattel or by arrest of the defendant or attachment of his property.² This power can be exercised in detinue as well as in any other action. In India a similar power is conferred on courts by the Specific Relief Act.³ The courts have a discretion which is usually exercised in the plaintiff's favour.⁴ But they may refuse to do so in exceptional cases, as where a thing has been made more valuable (*e.g.*, cotton spun into cloth, marble converted into statue), and pecuniary compensation would provide adequate relief.⁵

71. Action for money had and received.—The plaintiff may waive the tort of conversion and sue for 'money had and received to the plaintiff's use,' when his money or chattel has been converted. The action is for breach of a fictitious contract, known as quasi-contract, on the part of the defendant to repay the money or the value of the chattel.⁶ In the old procedure this alternative remedy in contract was popular and greatly in use on account of its procedural advantages.⁷ On the question whether the election of one remedy will bar the other the view that prevailed till recently was that the mere election *i.e.*, the institution of an action, without judgment or satisfaction being obtained in it, would be a bar. This view rested on certain dicta in a case decided by the Court of Appeal in England in 1873.⁸ It has now been overruled by the decision of the House of Lords in *United Australia, Ltd. v. Barclays Bank*.⁹ In this case the facts were these. The appellants who were the plaintiffs, United Australia, Ltd., received from their debtors a crossed cheque for 1,900*l.* payable to them. Their Secretary without authority indorsed the cheque so as to make it payable to the M. F. G. Trust of which he was a director. Thereupon the Trust indorsed the cheque and paid it into its account with the respondent-defendant, Barclays Bank. The Bank

1. C. L. P. Act, 1854, s. 78; *Bailey v. Gill*, (1919) 1 K. B. 41.

2. R. S. C., O. 48, r. 1.

3. Ss. 10 and 11; see also C. P. C., O. 21, r. 31.

4. This is especially the case when the plaintiff asks for return of documents of title; *Williams v. Archer*, (1847) 5 C. B. 318; *Macleod v. M'Ghee*, (1841) 2 M. & G. 326; *Goodman v. Boycott*, (1862) 2 B. & S. 1.

5. Specific Relief Act, s. 11 (*b*). In such cases the Roman law had fixed rules, known as *accessio*, *specificatio*, *confusio*. English law achieves by the instrument of justice known as 'judicial discretion' what the Roman law tried to do by fixed rules. See Salmond, Torts, p. 345.

6. Above, Chap. I, para. 17.

7. *E.g.* for evading the rule of *actio personalis moritur cum persona* applicable to trover. Holdsworth, Vol. VII, p. 442; below, Chap. XIX, para. 40.

8. *Smith v. Baker*, (1873) L.R. 8 C.P. 350. Later cases following it in England and India are no longer good law.

9. (1941) A.C. 1. Below, Chap. XIX, para. 39.

had knowledge of the dual position of the Secretary but without making enquiries collected the proceeds of the cheque and placed them to the credit of the Trust. The plaintiffs first sued the Trust to recover 1,900*l.* as money had and received. While proceedings were pending the Trust went into liquidation and the plaintiffs put in proof of their debt in the liquidation proceedings but did not obtain any recovery of the whole or part of the debt. They then sued the defendant Bank, and claimed for conversion of the cheque or alternatively for negligence. The House of Lords disagreeing with the lower courts allowed the claim and held that the institution of the previous action or the plaintiffs' putting in proof did not bar their present suit. The prior proceedings which did not result in judgment or satisfaction would not bar the adoption of the alternative remedy against the same defendant, much less against another defendant as in the present case. The rule of waiver would apply of course if a person seeks to get redress or satisfaction twice over by suing the same defendant or another in respect of a single injury. Therefore if the plaintiffs in the case had sued and obtained satisfaction from the Trust, they could not sue the Bank again for damages for a tort. In effect, therefore, "waiver of tort" is not a defence by itself unless it amounts to the other well-recognised plea of accord and satisfaction or discharge. The contrary view was plainly unjust and had also no historical justification. Its only claim to plausibility was that the phrase 'waiver of tort' which came into vogue in the old procedure might suggest an absolute waiver of the alternative remedy. The above decision is notable, first, for the juristic and historical discussion in the judgments, second, for the spirit of reform which made the judges discard an old rule which, though supported by long-standing precedent, was unreasonable. "These fantastic resemblances of contracts invented in order to meet the requirements of the law as to forms of action which have now disappeared should not in these days be allowed to affect actual rights. When these ghosts of the past stand in the path of justice clanking their mediaeval chains the proper course for the judge is to pass through them undeterred."¹

72. Action of replevin.—The nature of this action in English procedure has already been explained.²

73. Historical development of 'conversion.'³—The peculiarities in the name of this wrong and in its application to miscellaneous kinds of conduct, *e.g.*, taking by a trespasser, detention by a bailee, disposal by a bailee or a stranger, are explained by the origin and development of the action of trover.⁴ This action was designed to fill up

1. (1941) A.C. at p. 29, per Lord Atkin; another similar instance is the *Fibrosa case*, (1943) A.C. 32; above, Chap. I, paras. 19 and 20. 2. Above, para. 20.

3. *E.g.*, Madras Estates Land Act, s. 87; Bengal Tenancy Act, s. 136.

4. Holdsworth, Vol. III, p. 350; VII, 402; Ames, History of Trover, Anglo-American Essays, III, 417; Street, Vol. III, 159.

certain gaps in the remedial law relating to movable property and as in the case of the action of ejectment a free use of fictions was made for the purpose. The action of detinue came down from the early days of the King's courts as a remedy for recovering chattels or their value from a bailee, while the action of debt was the remedy for recovering a sum of money lent to another. Later on, detinue was allowed also against a person who was found in possession of the goods, and in that form was known as *detinue sur trover*. In this action the plaintiff alleged that he lost and the defendant found the goods.¹ But it was not available against a person who got them from a bailee or finder and disposed of them. It was not available also against a bailee who caused damage to the goods and returned them in that condition. In such cases the action of trespass was not appropriate as the defendant did not take the goods from the plaintiff's possession by any unlawful act. The action of detinue could also be defeated by the defendant claiming an archaic mode of trial like 'wager of law.'² On account of these defects in it, a new remedy was found in an action of trespass on the case, modelled on the old action of *detinue sur trover*, and came to be called simply as the action of trover. In this action, the plaintiff alleged that he lost the goods and the defendant found them and converted them to his own use. Except the allegation about conversion, the others were formal and fictitious and could not be denied by the defendant. The word 'conversion' was used originally in a more or less natural sense of disposal by change of form, e.g., melting of silver.³ But its meaning underwent a process of expansion on account of certain accidents of procedure. The new action of trover which had come into vogue by the middle of the sixteenth century became popular and tended to supersede the older remedies. It was used instead of detinue which, coming as it did from the days before trespass, was subject to old modes of trial and proof like 'wager of law.'⁴ Thus trover was allowed against a bailee who refused to deliver on demand, on the fictitious theory that a demand and refusal were evidence of a conversion, i.e., disposal.⁵ Then it was allowed also in cases where goods were taken away and the plaintiffs were permitted to waive the trespass and sue in trover on the principle that "one may qualify but not increase a tort."⁶ Thus the wrong of conversion came to include detention, taking and disposal, because the action of trover was extended to such cases. By its origin from the action of detinue, trover was impressed with the feature that it was a remedy for an injury to the immediate right of possession. This is now a common element in all forms of conversion.⁷ But trover was different from detinue in that it was a remedy for conversion and not mere detention. That aspect has been transmitted to all the later extensions of trover and therefore a mere taking is not a conversion. This action was in origin a delictual form of action of trespass on the case, and to this circumstance it owed another feature, viz., that it protected possession and not merely ownership and a bailee or

1. The way for this was prepared by detinue being allowed against the bailee's executor or other person in whose hands the goods were found (*devenerrunt ad manus*) after the bailee's death.

2. Above, Chap. I, para. 8; *Sutherland Publishing Co v. Caxton Publishing Co.*, (1936) 1 Ch. at p. 335, *per* Lord Wright.

3. A case of 1479, Y. B. 18 Ed. IV. 23 pl. 5; the defendant, a bailee, was charged with breaking and converting silver cups to his own use. This is said to be the earliest recorded instance of the use of the word 'conversion.' Street, Vol. III, p. 162.

4. Above, Chap. I, para. 8.

5. Above, para. 39.

6. *Bishop v. Viscountess Montague*, (1601) Cro. Eliz. 824; *Cooper v. Chitty*, (1756) 1 Burr. 20 at p. 31.

7. It obtained its modern phrasing in *Fouldes v. Willoughby*, (1841) 8 M. & W. 540, "an act adverse to or inconsistent with the owner's dominion."

finder could sue in trover and obtain the full value of the article.¹ But in spite of its delictual origin and its protecting the plaintiff's better right to possession, the fuller conception of an absolute ownership good against the whole world emerged through the action as courts allowed the defendant to plead a *ius tertii*. We saw a similar phenomenon in the case of the action of ejectment.² Finally in 1854 when courts got the power to order specific restitution instead of damages, the final stage was reached in the evolution of trover into a proprietary form of action.³ It is this aspect of it that accounts for the fact that liability for conversion does not conform to, and seems to be independent of, the normal requirements of delictual liability, *vis.*, intent and negligence. After the abolition of forms of action, ownership as such without possession can be asserted in an appropriate action regardless of the requirements of the old actions of trover and case. We are now accustomed to recognise ownership and possession as distinct juristic conceptions and ownership as the larger one of which possession is only a part. We now speak of possession as evidence of title, while under the developed system of common law pleading and procedure, ownership was material only as evidence of possession or a right to possess.⁴

74. Injury to reversion.—A person entitled to a reversionary interest in a chattel, *e.g.*, a bailor, can sue a stranger for any act of conversion or injury which deprives him temporarily or permanently of the benefit of his interest,⁵ *e.g.*, a sale in market overt, destruction of or physical injury to the chattel. He can also sue his bailee for negligence resulting in injury to the chattel while in the latter's possession. In these cases his remedy was formerly an action on the case and not trespass or trover.

75. Injury to incorporeal rights in chattels.—The chief instances of such rights are patent rights, copyright, and trade-marks. Injuries to them will be discussed later.⁶

76. Physical injury not amounting to trespass.—This would be an indirect injury. The usual remedy for unintentional injuries to chattels, whether direct or indirect, is an action for negligence.

77. War damage.—In England, by reason of Emergency legislation, a bailee who is under an obligation to insure, repair or replace goods is not liable for war damage as defined therein.⁷

1. Another feature was that the action was governed by the rule of *actio personalis moritur cum persona*; Holdsworth, Vol. VII, p. 441. 2. Above, Chap. IV, para. 17.

3. "Trover is based on property, trespass on possession"; Patterson, J. in *Balme v. Hutton*, (1833) 9 Bing. 471, 475; Cleasby, B. in *Fowler v. Hollins*, (1872) 7 Q.B. 616 at p. 639. 4. Pollock, Torts, p. 274.

5. *Mears v. L. & S. W. Ry. Co.*, (1862) 11 C.B. (N.S.) 850; *Lancashire Waggon Co. v. Fitzhugh*, (1861) 6 H. & N. 502; *Tancred v. Allgood*, (1859) 4 H. & N. 438.

6. Below, Chap. XII.

7. Liability for War Damage (Miscellaneous Provisions) Act, 1939, 2 & 3 Geo. 6, c. 102. s. 3 takes away liability of innkeeper for such damage.

CHAPTER VI.

NUISANCE.

1. **Nuisance.**—The word 'nuisance' like the word 'tort', is a French word which means harm in a generic sense,¹ but, owing to accidents of legal history, has acquired a special and technical meaning in law. It was originally introduced into legal terminology in two different contexts which account for its dual usage even at the present day; (a) the 'common' or 'public' nuisance in the criminal law, where it meant an offence against the King or the public, *e.g.*, an encroachment² on or obstruction of a highway, keeping a disorderly inn or public house; (b) the civil remedies, *viz.*, the assize of nuisance and, later, the action on the case of nuisance.³ The assize of nuisance, *assiza de nocumento*, was a writ stating the nature of the nuisance complained of and addressed to the sheriff to summon an 'assize', *i.e.*, a jury, to view the premises and decide the case. If it was found for the plaintiff, he had judgment to have the nuisance abated and to recover damages.⁴ This was the earliest remedy provided by the King's courts to secure undisturbed enjoyment of real property, but was subject to certain limitations, *e.g.*, that it did not lie against an alienee from the owner of the land who caused the nuisance.⁵ This led to the enactment of a special provision in the Statute of Westminster II⁶ allowing an action on the case of nuisance in similar cases. This action has thus the distinction of being the first and special product of that statute, while the other actions on the case arose later by virtue of the general authority conferred on the Chancery to issue writs in like cases. It was free from the restrictions of the old assize⁷ and ultimately became the remedy for various kinds of injuries for which there was no other suitable remedy, *e.g.*, disturbance of easements like those of way or light, of natural rights like the right to support or to the use of water in a natural stream, of other incorporeal rights like ferry, franchise or market, injuries to health, comfort or amenity. Therefore the wrong known as 'nuisance' in the modern law comprises the various and dissimilar injuries for which the action on the case of nuisance was used as a remedy. It is therefore incapable of precise

1. In this sense it was used by Chaucer; "Helpe me for to weye ageyne the feende.....Keepe us from his nusance" (Mother of God, I, 21); Salmond, Torts, p. 230, note (d).

2. This was called 'purpesture', Street, I, p. 213 n.

3. Per Lord Parker in *Hammerton v. Dysart*, (1916) 1 A.C. 57 at p. 84; per Lord Wright in *Sedleigh-Denfeld v. O'Callaghan*, (1940) A.C. 880, 902.

4. Blackstone, iii, p. 220.

5. Another limitation was that like the assize of novel disseisin for which it was a supplement it lay only for and against a freeholder and not, for instance, a lessee for a term.

6. (1278), s. 1; Wigmore, Cases on Torts, Vol. I, p. 16.

7. *Hammerton v. Dysart*, (1916) 1 A.C. 57 at p. 70.

definition,¹ and "covers a multitude of ill-assorted sins."² But some of its main characteristics may be stated.

2. **Main features of the wrong of nuisance.**—(a) Nuisance is an injury to the right of a person in possession of property to undisturbed enjoyment of it and results from an improper use by another person of his own property. This is usually expressed by saying that nuisance is a breach of the duty indicated by the Latin maxim *sic utere tuo ut alienum non laedas*,³ 'so use your own (property) as not to injure another's'. This maxim has long been a favourite citation in cases on nuisance, but it cannot be regarded as a definition of the duty⁴ as no user which does not infringe another's legal right is wrongful. In other words, nuisance is actionable only if it causes both damage and injury.⁵ For instance, an excavation by a person on his lands is a nuisance if it results in a subsidence of the neighbour's land but not if the latter's new house tumbles down, or if water flowing to the latter's well from an underground water-course not having a defined channel is intercepted.

(b) Nuisance is different from trespass because it is regarded as an injury to some right accessory to possession but not to possession itself. A right of way or of light is an incorporeal right over property not amounting to possession of it, and a disturbance of it is a nuisance and not a trespass.⁶ Sometimes a nuisance may be an injury to corporeal property but is indirect or consequential, e.g., subsidence of land caused by a neighbour's excavation of his own land,⁷ dust thrown on adjoining premises by building operations on one's own premises.⁸ Nuisance and trespass may overlap when

1. See *Sedleigh-Denfield v. O'Callaghan*, (1940) A.C. 880, for some definitions; also Blackstone's definition (iii, p. 216), of a private nuisance as "anything done to the hurt or annoyance of lands, tenements or hereditaments of another" is obviously too vague and is suggestive only of the wide scope of the old action.

2. Pearce and Meston, Nuisances, p. 1.

3. *Aldred's case*, (1610) 9 Co. Rep. 59 (a).

4. See per Erle, C.J. in *Bonomi v. Backhouse*, (1858) E.B. & E. 643; "the maxim *sic uter* etc., is mere verbiage. A party may damage the property of another where the law permits, and he may not where the law prohibits; so that the maxim can never be applied till the law is ascertained, and when it is, the maxim is superfluous." "This, like most maxims, is not only lacking in definiteness but is also inaccurate", per Lord Wright in (1940) A.C. at p. 903. Holmes called it, "an empty general proposition which teaches nothing but a benevolent yearning," Selected Essays on Torts, p. 164.

5. It is noteworthy that the phrases *damnum* and *injuria* were first used by Bracton in connection with the assize of nuisance; P. & M., Vol. II, p. 534; above, Chap. I, para. 27.

6. It is sometimes said that damage is the gist of the action of nuisance but not required in that of trespass; Joyce, Nuisances, p. 28. But an injury to a right, e.g., of way or of use of water may be actionable without proof of damage; *Kali Kishen v. Jodo Lal*, (1879) 6 L.A. 190 (water); *Kidgill v. Moor*, (1850) 9 C. B. 364 (way).

7. Above, Chapter IV, para. 23.

8. *Matania v. Nat. Prov. Bank*, (1936) 2 A.E.R. at p. 647, per Slesser, L.J.

the injury is to possession as well; *e.g.*, trespass of cattle, discharge of noxious matter into a stream and ultimately on another's land.¹

3. Categories of nuisance.—Nuisances fall into two categories under which they may be conveniently discussed: (i) disturbance of incorporeal rights in immovable property like easements; (ii) improper use of one's own property resulting in physical injury to the person, property or comfort of the occupier of another's property. We will deal, first, with public nuisances in so far as they have a bearing on this subject, and then with these categories of private nuisances.

4. Public nuisance.—A public or common nuisance is an injury, danger or annoyance to the public generally and an offence against public rights, safety or convenience.² A private nuisance is on the other hand an injury to the right of a person to the comfortable occupation of his own property. In some cases a private and public nuisance may concur, *e.g.*, a trade causing offensive noises or smells injurious to the neighbour's as well as the general public,³ obstruction of a highway resulting also in loss of access to occupiers of adjoining property.⁴ Whether a wrong is a private or a public nuisance will depend on the facts of each case, and is in many cases essentially a question of degree. While a private nuisance affects one or more occupiers of property, a public nuisance usually involves annoyance or danger to a fairly large section of the public in the vicinity.⁵ Sometimes a public nuisance may affect only a few persons as where it obstructs a public right, *e.g.*, obstruction of a public pathway leading to a few houses.

5. Distinction between public and private nuisance.—The main distinction has already been stated. It leads to the following points of difference: (a) An action for damages lies in respect of a private nuisance, but not in respect of a public nuisance unless the plaintiff can prove special damage to have resulted from it. (b) While a private nuisance may be abated, a public nuisance cannot be abated except to the extent to which it causes special damage to the person who desires to abate it.⁶ (c) While a

1. *Jones v. Llanrwst, U.C.*, (1911) 1 Ch. 393; below, para. 23.

2. See the definition in S. 268, I.P.C.; *cf.* Stephen, Dig. Cr. Law, Art. 197.

3. *Betts v. Penge U. D. C.*, (1942) 2 A.E.R. 61. See also *R. v. Pierce*, (1683) 2 Show. 327 (soap-boiling); *R. v. Smith*, (1725) 1 Str. 704 (speaking-trumpet); *R. v. Cross*, (1826) 2 C. & P. 483 (slaughter-house); *R. v. Moore*, (1832) 3 B. & Ad. 184 (collecting crowds); *R. v. Garland*, (1851) 5 Cox. C.C. 165 (arsenic manufacture).

4. *Lyon v. Fishmongers' Co.*, (1876) A.C. 662; *Eagle v. Charing Cross Ry. Co.*, (1866) L.R. 2 C.P. 638; *Benjamin v. Storr*, (1874) L.R. 9 C.P. 400.

5. *Soltan v. De Held*, (1851) 2 Sim. N.S. 133, at p. 143. See also *Khagendra Nath v. Bhupendra*, (1910) I.L.R. 38 Cal. 296, 299; 15 C.W.N. 316; *Ali Mahomed v. Municipal Commissioners of Bombay*, (1924) 27 Bom. L.R. 581; 1925 Bom. 458; *Hing v. Silas*, (1929) I.L.R. 57 Cal. 849.

6. Below, para. 88.

private nuisance may become legal by prescription, a public nuisance cannot be legalised after any length of time.¹

6. Remedies for a public nuisance.—The remedies are:—(a) A criminal indictment in England, and a criminal prosecution in India for the offence of causing a public nuisance.² (b) A civil action in England by the Attorney-General or by a relator with his authority, and in India by the Advocate-General or by two or more members of the public with his sanction.³ The action may be for a declaration or injunction or both.⁴ In the absence of special damage this is the only civil remedy of a member of the public. On the other hand in the case of a private nuisance affecting several persons, any one of them can sue.⁵ (c) In India a criminal proceeding before a Magistrate for removing a public nuisance.⁶

7. Nuisance relating to highways.—One class of public nuisances on which considerable case-law has gathered relates to highways. A highway is a way over which all members of the public have a right to pass and re-pass, e.g., a public road, bridge, navigable canal or river. It includes a *cul-de-sac*, and even a foot-path leading to a few houses, if it is not private property and is subject to the public right of passage. It is created in one of two ways: (a) by dedication, express or implied,⁷ by the owner of the land, and by acceptance by the public; or (b) by statute.⁸ There can be no valid dedication to a section of the public,⁹ but it may be limited in respect of the mode of user, e.g., to particular kinds of traffic.¹⁰ In the absence of evidence to the contrary, the soil of a highway is presumed to

1. *R. v. Cross*, (1812) 3 Camp. 224; *Vooght v. Winch*, (1819) 2 B. & Ald. 662; *Harvey v. Truro Rural Council*, (1903) 2 Ch. 638.

2. E.g., *A. G. v. Shrewsbury Bridge Co.*, (1882) 21 Ch. D. 752. As to difference between action by A. G. and action by member of the public for special damage, see *Vanderpant v. Mayfair Hotel*, (1930) 1 Ch. 138, 153. For proceedings under the Public Health Act, 1936, see below, paras. 87 and 90. 3. S. 91, C. P. C.

4. *Advocate-General v. Haji Ismail Hashan*, (1909) 12 Bom. L. R. 274; 5 I. C. 213.

5. *Ramghulam v. Ram Khelawan*, I. L. R. 16 Pat. 190; 1937 Pat. 481.

6. Criminal Procedure Code, ss. 133, 147, *Karuppanna v. Kandaswami*, (1914) 26 M. L. J. 233.

7. *Blount v. Layard*, (1891) 2 Ch. 681; *Behrens v. Richards*, (1905) 2 Ch. 614; *Williams-Ellis v. Cobb*, (1935) 1 K. B. 310; *Ardesor v. Aimal*, (1928) I. L. R. 53 Bom. 187; 31 Bom. L. R. 97 (dedication implied); *Bissessar v. Harbans*, 1937 Pat. 54 (village path); *Panchanon v. Fazlur Rahman*, I. L. R. (1942) 2 Cal. 427; 1942 Cal. 505 (dedication can be presumed from long user).

8. Rights of Way Act, 1932, (22 & 23 Geo. 5, c. 45); *Merstham Manor, Ltd. v. Coulsdon, etc. U. D. C.*, (1937) 2 K. B. 77.

9. *Poole v. Huskinson*, (1843) 11 M. & W. 827; *Subbaya v. Aiyavoo*, (1917) M. W. N. 70; 37 I. C. 977.

10. *Fisher v. Prowse*, (1862) 2 B. & S. 770; *Gautret v. Egerton*, (1867) L. R. 2 C. P. 371.

belong to the owners on either side *ad medium filae*.¹ This is however a rebuttable presumption. In India and in England statutes vest the ownership of highways, *i.e.*, the pavement and other material required for the purpose of passage,² in various local authorities, *e.g.*, municipalities and local boards in India. The owner of a highway may exercise all rights of ownership in it but subject to the public right of passage. He may sue in ejectment any person who encloses or encroaches on it,³ or in trespass one who uses it for a purpose other than the right of passage.⁴ He cannot sue where a Municipality owns a street and exercises its statutory powers. In a case from Allahabad⁵ the Privy Council held that the owner of the soil of a public street could not sue in trespass a person who had put up a portico in it with the permission of the Municipality in whom the street vested. The sanction of the Municipality would not however prevent proceedings being taken for special damage if the portico was a public nuisance. The owner of a highway cannot, unless authorised by statute, do any act which interferes with the public right of passage, *e.g.*, lay down a tramway,⁶ break open a public street for laying gas pipes⁷ or erect telegraph poles;⁸ if he does, he can be indicted for a public nuisance. The public right cannot be lost by non-user,⁹ nor can a right to obstruct it be acquired by prescription.¹⁰ The public must however take the highway with the obstructions and dangers existing at the time of the dedication. The right of passage exists on the whole street or road which would in the absence of evidence be presumed to extend up to the private property on either side.¹¹

1. *Dovaston v. Payne*, (1795) 2 Hy. Bl. 527, 531; *Behett v. Leads Corporation*, (1872) L.R. 7 Ch. Ap. 421; *Maharaja of Pithapuram v. Municipal Council, Cocanada*, (1936) 71 M.L.J. 749; 1936 Mad. 919.

2. *Wandsworth Board of Works v. United Telephone Co.*, (1884) 13 Q. B. D. 904; *Maharaja of Jaipur v. Arjun Lal*, I. L. R. 1937 All. 901 (P. C.): 64 I. A. 354. As to the ownership of trees on the soil, and the right of a local authority to remove them, see *Stilkwell v. New Windsor Corporation*, (1932) 2 Ch. 155; *Jagannatharaju v. Taluk Board, Rajmundry*, (1935) 69 M.L.J. 269; 1935 Mad. 810.

3. *Goodtitle d. Chester v. Alker & Elmes*, (1757) 1 Burr. 133, 146.

4. *Harrison v. Duke of Rutland*, (1893) 1 Q. B. 142; *Hickman v. Maisey*, (1900) 1 Q. B. 752; see also *R. v. Pratt*, (1855) 4 E. & B. 860.

5. *Maharaja of Jaipur v. Arjun Lal*, above.

6. *A. G. v. Barkar*, (1900) 83 L.T. 245; see also *R. v. Train*, (1862) 2 B. & S. 640.

7. *R. v. Longton Gas Co.*, (1860) 2 E. & E. 651.

8. *R. v. United Kingdom Electric Telegraph Co.*, (1852) 31 L.J.M.C. 166; as to telegraph wires, see *Wandsworth Board of Works v. United Telephone Co.*, (1884) 13 Q.B.D. 904.

9. *Dawes v. Hawkins*, (1860) 8 C.B.N.S. 848; *Turner v. Ringwood Highway Board*, (1870) L.R. 9 Eq. 418.

10. *R. v. Cross*, (1812) 3 Camp. 224; *Vooght v. Winch*, (1819) 2 B. & Ald. 662; *Harvey v. Truro Rural Council*, (1903) 2 Ch. 638: nor even by a grant from the Crown; *A. G. v. Burridge*, (1822) 10 Price 350; *A. G. v. Mayo*, (1902) 1 Ir. R. 13; *Ardesor v. Atmas*, (1928) I.L.R. 53 Bom. 187; 31 Bom.L.R. 97.

11. *Cf.* s. 3 (21) of the Madras District Municipalities Act, V of 1920.

It is subject to the right of access of owners of land on either side.¹ A public nuisance in respect of a highway may arise, (a) by obstruction of the public right of passage, (b) by creating a source of danger to those who have a right to use it, (c) by non-repair.

8. Obstruction of a highway.—A public nuisance may arise by reason of a fence across a highway or a trench in it, or by some other interference with free and convenient passage, *e.g.*, collecting crowds at a theatre² or a public meeting,³ near a highway. It must be an appreciable or sensible interference with the public right of passage.⁴ Acts incidental to the use of a highway like loading or unloading goods in it in front of a warehouse or making a horse and carriage stand in front of premises do not amount to obstruction if done reasonably and promptly, but may otherwise amount to a nuisance.⁵ Similarly the temporary obstruction of part of a public street for building purposes as by storing building material or erecting a scaffolding, if reasonable and duly licensed, cannot be regarded as a public nuisance.⁶ An obstruction existing at the time of dedication is not unlawful as the public are deemed to have taken the gift with its defects.⁷

9. Right of action in respect of an obstruction of a highway.—When an obstruction of a highway amounts to a public nuisance, the person causing it may be liable to a criminal prosecution, but not to a civil action at the instance of a member of the public for the damage or inconvenience which he suffered in common with other members of the public.⁸ This is a rule of very long standing in England⁹ and was intended to avoid multiplicity of actions,¹⁰ and harassment to persons or authorities like local bodies, water or gas companies who might be obliged to cause temporary obstruction in the course of repairs or works done on highways.¹¹ But in

1. *Marshall v. Blackpool Corporation*, (1935) A.C. 16, 22.

2. *Lyns v. Gulliver*, (1914) 1 Ch. 631; see also *R. v. Moore*, (1832) 3 B. & Ad. 184.

3. *Ex-parte Lewis*, (1886) 21 Q.B.D. 191; *Horner v. Cadman*, (1886) 55 L.J.M.C. 110.

4. *R. v. United Kingdom Electric Telegraph Co.*, (1882) 31 L.J.M.C. 166; *R. v. Bartholomew*, (1908) 1 K.B. 554; *Turner v. Ringwood Highway*, (1870) L.R. 9 Eq. 418.

5. *Benjamin v. Storr*, (1874) L.R. 9 C.P. 400; see also *R. v. Russel*, (1805) 6 East. 427; *R. v. Jones*, (1812) 3 Camp. 230 (sawing timber in a street); *A. G. v. Brighton and Hove Co-operative Supply Assn.*, (1900) 1 Ch. 276.

6. *Harper v. Haden & Sons*, (1933) Ch. 298.

7. *Fisher v. Prowse*, (1862) 2 B. & S. 770; *Robbins v. Jones*, (1863) 15 C.B.N.S. 221; *Jones v. Mathews*, (1885) 1 T.L.R. 482; *Brackley v. Midland Railway Co.*, (1916) 85 L.J.K.B. 1596.

8. *Vanderpant v. Mayfair Hotel*, (1930) 1 Ch. 138, 153; *Newman v. Real Estate Debenture Corporation*, (1940) 1 A.E.R. 131.

9. *Satku v. Ibrahim*, (1877) I.L.R. 2 Bom. 457.

10. *Per Holt, C.J. in Iveson v. Moore*, (1699) 1 Ld. Raym. 486 at 495.

11. *Per Kelly, C.B. in Winterbottom v. Lord Derby*, (1867) L.R. 2 Ex. 316 at 321.

course of time an exception was recognised,¹ viz., that an action would lie on proof of special damage, i.e., damage *peculiar* and *particular* to the plaintiff, and different from the damage suffered by the public.² In the leading case of *Iveson v. Moore*,³ damages were allowed for the deterioration in the value of the plaintiff's coal due to the delay in carting it from his colliery caused by the defendant's obstruction of a highway. Actions have been allowed on the ground of special damage, in *Rose v. Miles*⁴ where the plaintiff had, owing to an obstruction of the highway to incur expense by unloading his barge and carrying his goods overland, in *Campbell v. Paddington Borough Council*⁵ where the plaintiff lost the tenants who engaged windows in the plaintiff's house for viewing the procession for the funeral of Edward VII as the view was obstructed by an unauthorised hoarding erected by the defendants in the highway, in *Benjamin v. Storr*⁶ where by reason of the defendant's obstruction of the access to the plaintiff's coffee-house he had to burn gaslights all day and his customers were prevented from coming. The damage must be particular, i.e., different from what the plaintiff suffers in common with other members of the public. It may be different in kind or only in degree,⁷ but must be substantial and direct. Therefore a person who suffered merely personal inconvenience and not any pecuniary damage by having to take a longer route owing to an obstruction does not suffer any special damage.⁸ If he incurs expense in attempting to remove the obstruction, it is not recoverable as it is not a direct but a remote consequence of the defendant's act.⁹ The condition as to special damage does not, however, apply where the obstruction interferes with a private right of property and not merely with the right of passage along the highway.¹⁰

1. It was first recognised by Fitzherbert (1536) Y. B. 27 Hen. VIII, Mich. pl. 10; Holdsworth, Vol. VIII, pp. 424, 425.

2. *Medcalf v. Strawbridge, Ltd.*, (1937) 2 K.B. 102, 107.

3. (1699) 1 Ld. Raym. 486.

4. (1815) 4 M. & S. 101; see also *Blagrove v. Bristol Water Works Co.*, (1856) 1 H. & N. 369; *Blundy Clark & Co. v. L. & N. E. Ry. Co.*, (1931) 2 K.B. 334; *Ram Chandra v. Joti Prasad*, (1910) I.L.R. 33 All. 287.

5. (1911) 1 K. B. 869; cf. *Martin v. London County Council*, (1889) 80 L.T. 866; *Foli v. Devonshire Club*, (1887) 3 T.L.R. 706.

6. (1874) L.R. 9 C.P. 400; see also *Fritz v. Hobson*, (1880) 14 Ch. D. 542.

7. Per Lord Penzance in *Metropolitan Board of Works v. McCarthy*, (1874) L.R. 7 H.L. 243 at p. 263.

8. *Winterbottom v. Lord Derby*, (1867) L.R. 2 Ex. 316; see also *Hubert v. Groves*, (1794) 1 Esp. 148; cf. *Smith v. Wilson*, (1903) 2 Ir. R. 35; *Khafi Sayyed v. Ediga*, (1912) 12 M.L.T. 491.

9. *Winterbottom v. Lord Derby*, above.

10. *Medcalf v. Strawbridge, Ltd.*, (1937) 2 K.B. 102 (frontagers on a road held entitled to complain of damage to it); *Ramghulam v. Ramkhalawan*, (1936) I.L.R. 16 Pat. 190 (rule does not apply to interference with the right to use a village well).

In *Lyon v. Fishmongers' Co.*¹ the House of Lords held that where the defendant put up an embankment so as to deprive the plaintiff of the right of access from his wharf to the river Thames, he could sue for an invasion of that right. This principle will not apply where a person complains that he has been prevented by an obstruction from loading and unloading goods from vans in front of his premises, because once he gets access to the street, his right is only one of passage in common with other members of the public.² The damage may be directly to the occupier himself by obstruction of his access, or may be indirect by reason of loss of business or depreciation of selling or letting value of property.³ Such damage like any other must not be a remote consequence of the obstruction.⁴

10. The rule as to right of action in respect of obstruction of highways in India.—In India the rule requiring special damage has been followed.⁵ In the absence of such damage, the only civil remedy is a suit under S. 91, C.P.C. As a private individual has otherwise no right of action, a number of individuals cannot sue as a class of people aggrieved by the nuisance nor can some sue on their behalf and as their representatives under Order 1, r. 8 C.P.C.⁶ In this country, an obstruction of a peculiar kind is a frequent subject of litigation, *viz.*, obstruction of the right to use highways for processions by members of rival sects or religions. In such cases, the

1. (1876) 1 A.C. 662; see also *Rose v. Groves*, (1843) 5 M. & G. 613; *Cobb v. Saxby*, (1914) 3 K.B. 822; *Kandasami v. Karupanna*, (1913) M.W.N. 1001; 21 I.C. 601; *Bhuloganathan v. Rajagopala*, 1941 Mad. 669; *Dasarath Mahto v. Narain Mahto*, 1941 Pat. 249; *Mandakini v. Basantakumaree*, (1933) I.L.R. 60 Cal. 1003; *Municipal Committee, Delhi v. Mohammad*, 1935 Lah. 196.

2. *Chaplin v. Westminster Corporation*, (1901) 2 Ch. 329.

3. *Metropolitan Board of Works v. McCarthy*, (1874) L.R. 7 H.L. 243; *Blundy Clark & Co. v. L. & N. E. Ry. Co.*, (1931) 2 K.B. 334; *Ricket v. Metropolitan Ry. Co.*, (1867) L.R. 2 H.L. 175; 5 B. & S. 149, at pp. 156, 161, a case under the Land Clauses Consolidation Act, 1845, contained observations *contra*, but is now regarded as a decision on special facts. It was due to a feeling at the time that claims for compensation against railway companies acting under statutory powers had been carried too far. The case of *Wilkes v. Hungerford Market Co.*, (1835) 2 Bing. N.C. 281 in which compensation was allowed for loss of customers owing to obstruction was once regarded as overruled by *Ricket's case*, but in view of the later cases it is still good law; *Blundy Clark & Co. v. L. & N. E. Ry. Co.*, (1931) 2 K.B. at p. 362.

4. See below, para. 13.

5. *Baroda Prasad v. Gorakchand*, (1869) 3 B.L.R. 295; *Rajkomar v. Sahebzada*, (1877) I.L.R. 3 Cal. 20; *Bhawan v. Narotam*, (1909) I.L.R. 31 All. 444; 6 A.L.J. 499; *Ram Chandra v. Joti Prasad*, (1910) I.L.R. 33 All. 287; 8 A.L.J. 19; *Khafi v. Edige*, (1912) 23 M.L.J. 539; 16 I.C. 962; *Bhagvan Das v. Town Magistrate, Budawn*, 1929 All. 767; *Bibhuti Narayan v. Mahadev*, I.L.R. 19 Pat. 208; 1940 Pat. 449; *Surendra Kumar v. District Board*, I.L.R. (1942) 1 Cal. 533; 1942 Cal. 360; but not if a customary right of way in a village pathway is obstructed; *Lokanath v. Jadunandan*, 1933 All. 919; see also *Ramjanam v. Rambaran*, 1933 Pat. 302; *Venkatakrishna v. Srinivasachariar*, 1931 Mad. 452; 61 M.L.J. 135.

6. *Surendra Kumar v. District Board*, I.L.R. (1942) 1 Cal. 533; 1942 Cal. 360. See also *Martin & Co. v. Syed*, (1943) 48 C.W.N. 307 P.C.

cause of action is not a public nuisance but a denial of a right to use the highway¹ for which an action would lie apart from special damage. But in an early Bombay case² where the dispute was between two sects of Muhammadans about the use of a road for a procession and one of them obtained an order of a magistrate prohibiting the use of the road by the other sect, Sir Michael Westropp held that the action would not lie without special damage. This view was not followed by the Madras High Court³ and was overruled by the Privy Council in a case from Allahabad.⁴ The Calcutta and Patna High Courts have held—and it is submitted that this is the correct view—that the decision of the Privy Council does not affect the rule requiring special damage in the case of a public nuisance or render the rule inapplicable to India.⁵

11. Danger to a highway.—The source of danger to a highway and to persons using it may be in the highway itself, *e.g.*, an unlighted fence or excavation, a horse and carriage left unattended or a vehicle driven rashly.⁶ It may also be in adjoining property,⁷ *e.g.*, a building⁸ or other structure in dangerous condition,⁹ an unfenced excavation¹⁰ or cellar¹¹ near the highway, a golf course from which there was a risk of balls hitting persons in the highway,¹² an engine sending sparks,¹³ a barbed

1. *Velan v. Subbayan*, (1918) I. L. R. 42 Mad. 271 : 36 M. L. J. 79. It may also amount to a trespass, *viz.*, assault or threat of it, when there is physical obstruction.

2. *Sathu v. Ibrahim*, (1877) I. L. R. 2 Bom. 457.

3. *Velan v. Subbayan*, (1919) I. L. R. 42 Mad. 271; *Chenna Basappa v. Sankara*, (1929) 29 L. W. 604 (head of mutt awarded Rs. 1,000 damages for loss of dignity resulting from obstruction by a rival sect from being taken in a procession with honours along a public road).

4. *Mansur v. Muhammad*, (1924) I.L.R. 47 All. 151 (P.C.): 52 I.A. 61; *Martin & Co. v. Syed*, (1943) 48 C.W.N. 307 P.C.; see also *Jaffer Husain v. Krishnan Servai*, (1929) I.L.R. 53 Mad. 761 : 58 M.L.J. 703; *Mahomed Hasan v. Amba Prasad*, 1934 All. 941.

5. *Surendra Kumar v. District Board*, *Bibhuti Narayan v. Mahadev*, above, p. 160, note 5; see also *Appayya v. Narasimhalu*, 1938 Mad. 338; *Bhuloganathan v. Rajagopala*, (1941) 2 M. L. J. 105 : 1941 Mad. 669; *Kanhai Lal v. Bhorey Lal*, 1939 All. 655.

6. A motor bus on a road which is greasy after rain is not a public nuisance on the mere ground that it may skid; see *Wing v. London General Omnibus Co.*, (1909) 2 K. B. 652; *Parker v. London General Omnibus Co.*, (1909) 101 L. T. 623.

7. *The Carlgarth*, (1927) P. at p. 102; see also *Priest v. Manchester Corporation*, (1915) 84 L. J. K. B. 1734.

8. *R. v. Watts*, (1703) 1 Salk. 357.

9. *Mullan v. Forrester*, (1921) 2 Ir. R. 412; *Witchick v. Marks*, (1934) 2 K.B. 56.

10. *Barnes v. Ward*, (1850) 9 C.B. 392; *A. G. v. Roe*, (1915) 1 Ch. 235. Cf. *Nicholson v. Southern Ry. Co.*, (1935) 1 K.B. 558 (adjoining owner not liable for danger due to highway being made higher than his land).

11. *Jewson v. Gatti*, (1885) 1 T.L.R. 635; 2 T.L.R. 381, 441.

12. *Castle v. St. Augustine's Links*, (1922) 38 T. L. R. 615. It would be otherwise if the person hit was another golf player or a caddy; see the American cases cited in 66 U.S.L. Review, p. 291; 35 Law Notes, p. 153; below, Chap. XVIII, para. 26.

13. *Mansell v. Webb*, (1919) 88 L.J.K.B. 323.

wire fence,¹ any unusual object likely to frighten animals driven along.² While inanimate objects have been held to be sources of danger, animals like cattle, dogs or fowls straying into a highway from adjoining land have not been regarded as such. An action in respect of injury to men or vehicles on the highway by such an animal will lie only on proof of scienter or of negligence.³ The source of danger must be substantially adjoining the highway if it is to be regarded as a public nuisance. Where a person strayed off a highway into private property and fell into a reservoir away from the road, it was held he could not recover.⁴ An object may be a source of danger to a child though not to an adult.⁵ In *Lynch v. Nurdin*,⁶ a child which was injured by meddling with a cart and horse left unattended on a public road by the defendant's servants was held entitled to recover. An adult could obviously not have recovered in similar circumstances. A boy of seven years of age ran out from the pavement towards a lorry and trailer, laden with sacks of sugar, for the purpose of catching some of the sugar escaping from one of the sacks. He was injured by the trailer running over his left foot. He was held entitled to recover as the lorry was in the circumstances a trap.⁷ "It is not a mere lorry, but a species of juggernaut dropping sugar into the roadway as it goes and blinding children of such tender years as the plaintiff's to the danger of too close an approach to it."⁷ Where, however, there was no such object as required precautions against the interference of children, or in the usual phrase, no 'trap' or 'allurement', then even a child cannot complain of injury brought on itself by its own meddling.⁸ A danger to a highway caused in the above modes is a public nuisance under the common law and in many cases also under statute.⁹ The remedy is an indictment but an action lies on proof

1. Barbed Wire Act, 1893, 56 & 57 Vict. c. 32; *Stewart v. Wright*, (1893) 9 T.L.R. 490; *Gibson v. Plumstead*, (1897) 13 T.L.R. 273.

2. *Hill v. New River Co.*, (1868) 9 B. & S. 303; *Harris v. Mobbs*, (1878) 3 Ex. D. 269; *Wilkins v. Day*, (1883) 12 Q.B.D. 110; *Brown v. Eastern & Midland Ry.*, (1889) 22 Q.B.D. 391.

3. Below, paras. 69 and 71.

4. *Hardcastle v. The South Yorkshire Ry. & River Dun Co.*, (1859) 4 H. & N. 67; *Hounsell v. Smyth*, (1860) 6 C.B.N.S. 731; *Binks v. South Yorkshire Ry. & River Dun Co.*, (1862) 3 B. & S. 244; cf. *Hadley v. Taylor*, (1865) L.R. 1 C.P. 53.

5. *Jewson v. Gatti*, (1885) 1 T.L.R. 635; 2 T.L.R. 381, 414; *Cooke v. Midland Great Western Railway Co.*, (1909) A.C. 229. As to traps for children, see below, Chap. XIV, paras. 17, 26 and 88.

6. (1841) 1 Q.B. 29. This is generally regarded as a case of negligence; but in *Latham v. Johnson*, (1913) 1 K.B. 398 at p. 403 Farwell, L.J. spoke of it as a case of public nuisance.

7. *Culkin v. McFie & Sons*, (1939) 3 A.E.R. 613, 620, per Croom-Johnson, J.

8. *Latham v. Johnson*, (1913) 1 K.B. 398; *Donovan v. Union Cartage Co., Ltd.*, (1933) 2 K.B. 78.

9. See the Highways Acts, 1835 (5 & 6 Will. 4, c. 50) and 1864 (27 and 28 Vict. c. 101), and the Public Health Act, 1875 and the later Acts now consolidated by the P.H. Act, 1936.

of special damage. Such damage would usually be some physical injury to person or property.

12. Points to be proved in an action for special damage.—In the action for special damage arising from a public nuisance, the plaintiff must prove the following points :—(a) A public nuisance. (b) Special damage to him arising as a direct consequence of the nuisance. If it was due to the fault of the plaintiff himself¹ or a third party,² the defendant, the author of the nuisance, cannot of course be made liable. (c) The plaintiff was at the time lawfully using the highway.³ (d) The defendant was the occupier or person in possession and control of the premises with the nuisance on it. The plaintiff can sue also the owner or landlord if he had agreed with the tenant to repair⁴ or reserved control of the premises.⁵ On proof of the above points the plaintiff makes out his case. He need not allege or prove any wilful act or negligence of the defendant. The action for special damage is thus different from an ordinary action for negligence where the plaintiff must prove the defendant's negligence as part of his case.⁶

13. Principles of liability for special damage.—There is no distinction in the principles of liability between an action for special damage due to a public nuisance and one for a private nuisance.⁷ Therefore the rules set out in later paragraphs⁸ dealing with private nuisance will apply here also. Some of the more important cases of public nuisance may be analysed as follows :—

(a) The main principle is that the occupier or owner in control of his premises should cause or continue the nuisance, public or private. He

1. *Barker v. Herbert*, (1911) 2 K.B. 633; *Horridge v. Makinson*, (1915) 84 L.J.K.B. 1294; cf. *Fenna v. Clare Co.*, (1895) 1 Q.B. 199; *Butterly v. Drogheda Corporation*, (1907) 2 I.R. 134; *Torrance v. Ilford District Council*, (1909) 73 J.P. 225.

2. *Horridge v. Makinson*, (1915) 84 L.J.K.B. 1294; cf. *Crane v. South Suburban Gas Co.*, (1916) 1 K.B. 33.

3. *Bromley v. Mercer*, (1922) 2 K.B. 126; cf. *Harrold v. Watney*, (1898) 2 Q.B. 320; see also *Barker v. Herbert*, (1911) 2 K.B. 633; *Stiefsohn v. Brooke Bond & Co.*, (1889) 5 T.L.R. 684; *Liddle v. Yorkshire C. C.*, (1934) 2 K.B. 101; see also *Fenna v. Clare*, (1895) 1 Q.B. 199 (a girl nine years old injured by a low wall with sharp spikes); *John Wyllie v. Secretary of State for India*, (1928) 111 I.C. 549 (Lah.) (a boy of eight injured by the gate in a public garden); below, Chap. XIV, para. 88.

4. *Wringe v. Cohen*, (1940) 1 K.B. 229.

5. *Walchick v. Marks*, (1934) 2 K.B. 50, *Heap v. Ind. Coops. & Co. Ltd.*, (1940) 2 K.B. 476; cf. landlord's liability for private nuisance, below, para. 59; for injury to visitor, below, Chap. XIV, paras. 23 and 24.

6. *Iving v. London General Omnibus Co.*, (1909) 2 K.B. 652, 665; *Crane v. South Suburban Gas Co.*, (1916) 1 K.B. 33, 35, for a like rule in the case of a private nuisance, see, *Ilford U.D.C. v. Beal*, (1925) 1 K.B. 671; *St. Anne's Well Brewery Co. v. Roberts*, (1928) 44 T.L.R. 703; in the case of misfeasance by a statutory authority, *Papworth v. Battersea B.C.*, (1915) 84 L.J. K.B. 1885; below, para. 62.

7. *Sedleigh Denfield v. O'Callaghan*, (1940) A.C. 880 at pp. 897, 904.

8. Below, paras. 56 to 62.

may cause it by active conduct or by neglect to abate it. In either case it is no excuse that he does not know the actual danger due to his act or default.¹ He may be liable for continuing a nuisance caused by a stranger or by natural causes where with knowledge, actual or presumed, of its existence he fails to remove it. The liability is not absolute and independent of negligence and it is open to the defendant to show that it was not reasonably possible for him to know or abate the nuisance. But a high degree of care is required on the part of the occupier or owner of premises to avoid harm to persons exercising a public right over the highway.

ILLUSTRATIONS.

Defendant held not liable.—*Barker v. Herbert*:² One of the rails in the railings of defendant's premises was broken away by boys playing football in the street and a gap had been created. The plaintiff, a child, who got through the gap from the street and fell into the area on the other side was held not entitled to recover as the defendant had not enough time to discover the defect after it had been caused.

Noble v. Harrison:³ A branch of a tree in the defendant's land, overhanging a highway, broke off and fell on the plaintiff who was passing by. The defendant was held not liable as the tree was not an obstruction to passage in the highway nor was known to him to be in a dangerous condition.

Cushing v. Peter Walker & Son:⁴ This is a case of injury due to enemy action during the war. A slate fell from the roof of the defendants' premises and injured the plaintiff walking along the highway. The slate had been loosened by the blast from an enemy bomb 18 days before this occurrence and fell down by the action of a high wind. The defendants were held not liable as they could not be considered to have continued the nuisance, the existence of which they could not have known on a reasonable inspection of the roof.

Defendant held liable.—*Slater v. Worthington's Cash Stores*:⁵ An occupier of premises was held liable for injury caused by the fall of snow from his roof on the plaintiff walking along a highway, as the snow had fallen four days before in a severe snow storm and had accumulated on the roof.

Dollman v. Hillman:⁶ The plaintiff slipped on the pavement by putting her foot on a piece of fat lying there. The defendant, a butcher, owning a shop near the spot was held liable on the ground that the piece of fat either flew from his shop when meat was cut or was carried by a customer's shoe.

Wringe v. Cohen:⁷ The defendant had let his house to a tenant and had agreed with him to repair it. By reason of want of repair, the wall of the gable-end of the

1. *A.G. v. Tod Heatley*, (1897) 1 Ch. 560; *Mullan v. Forrester*, (1921) 2 Ir. R. 412; *Clayton v. Sale U.D.C.*, (1926) 1 K.B. 416.

2. (1911) 2 K.B. 633. See *Liddle v. Yorkshire C.C.*, (1934) 2 K.B. 101.

3. (1926) 2 K.B. 332, 338; see *Palmer v. Bateman*, (1908) 2 Ir. R. 393 (the defendant held not liable for injury due to a piece of gutter from a wall in his premises falling on a passer-by); *Pauline v. Cassamalli*, 1333 Bom. 465 (ornamental structure in a building falling on a motor car in a road, defendant held not liable); cf. *Pritchard v. Peto*, (1917) 2 K.B. 173.

4. (1941) 2 A.E.R. 693.

5. (1941) 1 K.B. 488 C.A. See also *Leanse v. Egerton*, (1943) 1 K.B. 323 (occupier held liable for piece of glass falling from house some days after air-raid).

6. (1941) 1 A.E.R. 355 C.A.

7. (1940) 1 K.B. 229.

house had become a danger to passers-by and adjoining owners. The gable-end collapsed in a storm and fell through the roof of the plaintiff's house. It was held on these facts that the defendant was liable and it was not necessary to show that he knew or ought to have known of want of repair. The action was, no doubt, for a private nuisance but it was also a public nuisance and the same rule was applied.

(b) The occupier or owner is liable even for the fault of an independent contractor.¹ This principle applies *a fortiori* to persons who interfere with a highway or cause an obstruction in it.² In England and in India, municipal and local authorities have been held liable for injury due to the negligence of contractors in the course of repairing roads, owned by those bodies, *e.g.*, by leaving a heap of gravel or a trench unlighted or unfenced³. But it must be remembered that there can be no liability of the employer of a contractor for the latter's 'casual' or 'collateral' negligence, when he is employed on work not in itself dangerous to the highway.⁴

ILLUSTRATIONS.

Liability for contractor's fault—*Tarry v. Ashton*:⁵ The occupier of premises which had a large lamp projecting on a highway had employed an experienced fitter to repair the lamp and its fittings. The fittings nevertheless, continued to be faulty and the lamp fell on a person walking on the highway. The occupier was held liable. This, it may be noted, is a case of an artificial projection attended with risk to passers-by.

No liability for collateral negligence.—*Wilson v. Hodgson's Kingston Brewery Co.*:⁶ A brewery company which employed a contractor to deliver goods at a customer's house abutting a highway was held not liable for the negligence of the contractor's servants in leaving open cellar flaps near the highway with the result that a passer-by tripped and fell into the cellar and was injured.

Padbury v. Holliday and Greenwood Ltd.:⁷ An occupier of premises near a highway who employed a contractor to repair the windows in his house was held not

1. *Pickard v. Smith*, (1861) 10 C. B. (N. S.) 470; the defendant, a lessee of a refreshment room in a railway station, was held liable for injury to a person on the platform who fell into a cellar whose trapdoor was usually closed, but which at that time was negligently kept open by a coal merchant who had shot the coals into the cellar.

2. In the case of a vessel sunk in a tideway of a navigable river the owner of the vessel is bound to light or buoy the wreck; *The Snark*, (1900) P. 105. If he sells it, the obligation passes to the purchaser; *White v. Crisp*, (1834) 10 Ex. 312. If he abandons it, it ceases altogether; *The Douglas* (1882) 7 P. D. p. 160; *Barraclough v. Brown*, (1897) A. C. 615. But if the wreck was due to his negligence, he cannot by sale or abandonment get rid of his liability for the consequences, *e.g.*, the expenses incurred in removing the wreck; *The Ella*, (1915) P. 111; *Dee Conservancy Board v. McConnell*, (1928) 2 K. B. 159.

3. *Hole v. Sittingbourne Ry.*, (1861) 6 H. & N. 488; *Gray v. Pullen*, (1864) 5 B. & S. 970; *Penny v. Wimbledon U. C.*, (1899) 2 Q. B. 72; *Holliday v. National Telephone Co.*, (1899) 2 Q. B. 392; *Municipal Council of Visagapatam v. Foster*, (1917) 1 L. R. 41 Mad. 538.

4. *Quarman v. Burnett*, (1840) 6 M. & W. 499, (below, Chap. XVI, para. 4), is an illustration; *Pinn v. Rew*, (1916) 32 T. L. R. 451 is a curious case where driving a cow and calf was held dangerous within this rule. See also *Dalton v. Angus*, (1881) 6 A. C. 740, 829, per Lord Blackburn; *Hardaker v. Idle D. C.*, (1896) 1 Q. B. 335, 341-342, 352.

5. (1876) 1 Q. B. D. 314.

6. (1916) 85 L. J. K. B. 270.

7. (1918) 28 T. L. R. 492; See also *Reedie v. L. & N. W. Ry. Co.*, (1849) 4 Ex. 244.

liable for injury due to the latter's servants negligently letting fall a tool on a person on the road.

14. Nature of liability for special damage.—There was a tendency in the older cases to regard this liability as strict or absolute and falling in a special category different from liability for private nuisance. But in *Sedleigh-Denfield v. O'Callaghan*¹ the House of Lords has ruled to the contrary. Therefore the liability is not absolute like that of an insurer unless the case fell under the special rule in *Rylands v. Fletcher*² or under statute.³ Indeed proof of a public nuisance may often involve proof of facts which will make out a civil cause of action for negligence.⁴ There is also no distinction between the principles of liability applicable to a public and private nuisance. But a distinction may arise in applying the principle of due care to them. In the first place, the degree of care towards persons using a highway may on particular facts be higher than that towards a neighbour. Secondly, a presumption of negligence may arise from the mere fact of injury by a nuisance on private premises to a person on the highway,⁵ but may not arise in the case of a private nuisance. The presumption will not also arise, and it is for the plaintiff to prove negligence, if the public nuisance arose from a negligent performance of a work authorised by statute.⁶

15. Immunity of highway authority for damage caused by non-repair of a highway.—To the above rule that an action lies for special damage arising from a public nuisance, there is an exception in England, *viz.*, that no action lies against a highway authority for special damage due to non-repair of a highway. Formerly the ownership of highways and the duty of maintaining them in repair were under the common law vested in the parish where the highway was situate. For a public nuisance arising from a breach of this common law duty, the parish and its inhabitants were liable to indictment.⁷ In *Russell v. Men of Devon*,⁸ it was held that this

1. (1940) A.C. 880. See also *Wringe v. Cohen*, (1940) 1 K.B. 229 C.A. With these cases, *Bromley v. Mercer*, (1922) 2 K.B. 126 C.A. would appear to be in conflict, but curiously enough, was not referred to in them; nor was *Wringe v. Cohen*, referred to in the H.L. case.

2. Below, para. 64; see cases in p. 163, note 6, above.

3. The Towns Improvement Clauses Act 1847 (10 and 11 Vict. c. 34), s. 79; Public Health Amendment Act, 1907 (7 Ed. 7 c. 53), s. 29. In India see, *e.g.*, the Madras District Municipalities Act, 1920, s. 184 (1) (a). As to breach of statutory duties, see below, Chap. XVII.

4. Cf. I.P.C., ss. 268–269.

5. *Byrne v. Boadle*, (1863) 2 H. & C. 722, *Kearney v. L. B. & Ry. Co.*, (1871) L.R. 6 Q.B. 759; see below, Chap. XIV, para. 96; cf. *Hudson v. Bray*, (1917) 1 K.B. 520 (occupier held not liable for obstruction by a tree blown down by a gale).

6. *Papworth v. Battersea Corporation*, (1916) 1 K.B. 583; see also *Lambert v. Lowestoft Corporation*, (1901) K.B. 590; *Chaplin v. Westminster Corporation*, (1901) 2 Ch. 329; *Great Central Co. v. Hewlett*, (1916) 2 A.C. 511. Below, Chap. XVIII, para. 21.

7. *R. v. Great Broughton*, (1771) 5 Burr. 2700; *R. v. Sheffield*, (1787) 2 T.R. 111. The earlier remedy was 'presentment.'

8. (1787) 2 T.R. 667.

was the only remedy, and no action for damages for injury to a member of the public resulting from non-repair would lie against the parish. Lord Kenyon rested his decision mainly on the ground¹ that actions should not be allowed against an indefinite and unincorporated body of persons like the inhabitants of a parish. He observed that if such actions were allowed even persons who became residents of the parish after the injury would be made to pay damages from their private funds. Ashhurst, J. referred to the inconvenience that would result from a multiplicity of actions for contribution by such of the residents as had to pay against each of the others for his proportion. These arguments ceased to have any force after highways were vested in statutory corporations during the last century. But the rule of immunity has continued in the case-law of England. The Highways Act, 1835² laid the duty of repair on an official known as the surveyor of the parish, and prescribed a special procedure for enforcing the duty against him. It was held that these provisions of the Act negatived any right of action against a surveyor for damage due to non-repair.³ Later statutes⁴ constituted various rural and urban authorities in the place of the parish and imposed upon them the same duties as those of the surveyor under the Highways Act. It was therefore held in the leading case of *Cowley v. Newmarket Local Board*⁵ that the defendants, a local authority, could not be sued for damages for the injury caused to the plaintiff by their neglect of the duty imposed by the Public Health Act, 1875, to keep a road in repair. The principle of this decision has been applied in numerous cases.⁶ In *Moore v. Lambeth Water Co.*,⁷ injury resulted from a fire-plug placed by a water-company and projecting over the road. It was held that no action lay against the water company as the plug was in good condition, nor against the highway authority as it was not liable for the consequences of

1 His argument based on a precedent in *Brook's Abridgment* (1496) 3 Ed IV, p. 2, Pl 24 is said to proceed on a mis translation, *Potkin on Public Authority and Legal Liability*, p 84, *Rundle v Hearle*, (1898) 2 Q. B 81 86, 87.

2 546 Will IV, c 50, s 94-96.

3. *Young v Davis* (1862) 2 L. & C. 197, see also *McKinnon v Penion*, (1874), 9 Ex 319; 9 Ex 60. (under 43 Geo. III, c. 79)

4 Public Health Act, 1848, 11 & 12 Vict. c. 63, Highways Act, 1862, 25 and 26 Vict. c. 61, Public Health Act 1875, 39 & 40 Vict. c. 75 Local Government Act 1894, 56 & 57 Vict. c. 73, and for the Metropolis, see the Metropolis Management Act, 1862, 18 & 19 Vict. c. 120. 5 (1892) A.C. 345.

6. *R.R., Tregellas & London County Council* (1897) 14, 1 P. 75 (tree cutting and logging paragraph at top of item), *Following: Lord Mayor of Birmingham* (1904) 69 J P 726 (which contains logging and fire insurance), *short & Hampshire smelter Corporation* (1916) 104 J. P. 70, (tree has been cut down and poles felled in it), *Moul & Thomas Tilling, Ltd* (1918) 113 J K B 505, (the tree was being cut for power), *Masters v Hampshire County Council* (1917) 141 J P 2194, (tree overgrown with grass and a person falling into it), *Leobach & Co Ltd* (not affected by the L.C.A. 1929), *A v Tedmorton, UG*, (1913) 4 A P R 588, (not felled), J.

7 (1989) 17 Q. B. D 468

the road wearing away. In *Thompson v. Mayor of Brighton*,¹ the logical result of this was applied. Where a sewer grating had been placed by the same local authority in charge of roads and sewers, an action was held not to lie for injury resulting from the sewer lid projecting over the road owing to the bad condition of the road. The law on this subject was characterised as "very unsatisfactory" by Lindley, L.J. in this case and similar opinions have been expressed by other authorities since then.² But the rule of immunity has lingered for no better reason than that the modern road authority is the lineal successor of the older authorities, first, the surveyor and before him, the inhabitants at large³ and can have only the same obligations as they had. Indeed the rule, unreasonable in itself, has often been extended into a wider one of immunity for statutory authorities in general for non-feasance.⁴ It will be apparent from the illustrations given in the following paragraph that there is no basis in the case-law for this generalisation. There is also no basis in principle for the immunity of highway authorities for non-repair and no reason why they should not be liable on the ground, first, of breach of statutory duty leading to damage, second, of breach of a common law duty to avoid a public nuisance arising in property under their control.⁵ This liability would appear to follow from well-established principles unless it is excluded expressly or impliedly by the particular statute.⁶ The rule of immunity has been rendered *tolerable* by courts recognising the qualification that a highway authority is liable for misfeasance. As modern roads are by reason of artificial and extraneous works and structures in them very different from old ones and dangers usually arise by neglect in respect of such works and structures, road authorities are held liable by regarding such neglect as a misfeasance. The rule is to be limited to non-repair of a road *qua* road by a highway authority *qua* such authority.⁷

1. (1894) 1 Q.B. 332, 337.

2. 59 L.Q.R. 103; 48 L.Q.R. 154.

3. *Simon v. Islington B.C.*, (1943) 1 K.B. 188, at p. 197, C.A., *per* Scott, L.J.

4. *E.g. Hesketh v. Birmingham Corporation*, (1924) 1 K.B. at p. 271, *per* Scrutton, L.J. More recently this extension is not favoured; Hart and Hart, *Local Government*, p. 407; Robinson, *Public Authorities*, p. 162. Below, para. 23 and Chap. XVII.

5. *Shoreditch v. Bull*, (1904) 20 T.L.R. 254, *per* Lord Halsbury; *Gould v. Birkenhead Corporation*, (1910) 74 J.P. 105; *Tregellas v. London County Council*, (1897) 14 T.L.R. 55, *per* Darling, J.

6. See below, Chap. XVII. In the United States courts have allowed, and in some states statutes provide, the remedy by action against Municipal Corporations for injury due to neglect of highways; Dillon, *Municipal Corporations*, Vol. II, ss. 996, 1017 to 1023, Cooley, *Torts*, p. 1315; *cf.* Restatement, II, §§ 286—288. It is otherwise in the case of unincorporated townships and counties. As regards the Colonies, *Municipality of Pictou v. Geldert*, (1893) A.C. 524 and *Municipal Council, Sydney v. Bourke*, (1895) A.C. 433 which follow *Cowley's case* are the result of the statutes in question; *cf.*, *Corporation of Raleigh v. Williams*, (1893) A.C. 540 (where a statute of Ontario allowed an action for non-repair of drainage works).

7. *Simon v. Islington B.C. ibid*; Salmond, *Torts*, p. 298; Pearce and Meston, *Nuisances*, pp. 172, 173.

16. **Liability of highway authority for misfeasance.**—The following are some instances of liability for misfeasance.¹ Actions have been allowed for injury arising by negligence in executing repairs in a highway,² by interfering with it but failing to restore it to its original condition,³ or by introducing an artificial work like a drain or sewer into a highway and allowing it to become dangerous,⁴ by failure to discover and remedy sources of danger arising from repairs which had been executed at an earlier time and without negligence.⁵ In *Morrison v. Mayor of Sheffield*,⁶ the defendants, an urban authority, had planted trees on the roadside and fenced them with iron spikes. During the last war lights were put out under the lighting regulations and the plaintiff was hurt by one of the spikes in the darkness. The defendants were held liable on the ground that they were bound to take measures to remove the danger which resulted from the altered conditions due to the absence of lights. But if the particular work or structure was authorised by statute, the result will be different. In *Great Central Railway Co. v. Hewlett*⁷ a local authority had erected long ago in a highway certain gate-posts which were legalised by Act of Parliament. During the last war a taxi-cab collided with the gate posts when lights were put out under the lighting regulations. The House of Lords held the authority not liable. The principle of this case has been followed in similar cases in the present war. In *Wodehouse v. Levy*⁸

1. For others, see *McClelland v. Manchester Corporation*, (1912) 1 K.B. 118; *Thompson v. Bradford Corporation*, (1915) 3 K.B. 13; *Baldwin's Ltd. v. Halifax Corporation*, (1916) 85 L.J.K.B. 1769; *Oldham v. Sheffield Corporation*, (1927) 43 T.L.R. 222. But a local authority which merely took over a highway with a danger in it due to the faulty construction of a drain by a previous authority was held not liable; *Nash v. Rochford Rural District Council*, (1917) 1 K.B. 384; *Craib v. Woolwich Borough Council*, (1920) 36 T.L.R. 630. The liability for misfeasance is not independent of negligence unless the statute indicates an absolute liability; *Papworth v. Battersea Borough Council*, (1915) 84 L.J. 1881, 1885; *Ely Brewery Co. v. Pontypridd, U. D. C.*, (1904) 68 J.P. 3.

2. *Davis v. Curling*, (1845) 8 Q.B. 286; *Foreman v. Mayor of Canterbury*, (1871) L.R. 6 Q.B. 214; *Gould v. Birkenhead Corporation*, (1910) 74 J.P. 105; *Parkinson v. Yorkshire County Council*, (1922) 20 L.G.R. 308; *Nicholson v. Southern Ry. Co.*, (1935) 1 K.B. 558; *Withington v. Bolton, B.C.*, (1937) 3 A.E.R. 108.

3. *Shoreditch Corporation v. Bull*, (1904) 20 T.L.R. 254; see also *Smith v. West Derby Local Board*, (1878) 3 C.P.D. 423; *Hartley v. Rochdale Corporation*, (1908) 2 K.B. 594; *Whyler v. Bingham Rural Council*, (1901) 1 Q.B. 45; *O'Brien v. Waterford County Council*, (1926) Ir. R. 1 (negligent fencing of bridge under repair).

4. *Borough of Bathurst v. MacPherson*, (1879) 4 A.C. 256; see this case explained in *Municipality of Sydney v. Bourke*, (1895) A.C. 433; see also *White v. Hindley Local Board of Health*, (1875) L.R. 10 Q.B. 219; *Blackburn v. Vestry of Mile End Old Town*, (1882) 9 Q.B.D. 451; *Winslow v. Bushey Urban Council*, (1908) 42 J.P. 64; *Noor Bibi v. Ambala Municipality*, 1939 Lah. 453.

5. *Newsome v. Darton U.D.C.*, (1938) 3 A.E.R. 93.

6. (1917) 2 K.B. 886; see also *Ballock v. Westminster C. C.*, (1918) 88 L.J.K.B. 502; *Folkington v. Lambeth, B.C.*, (1938) 1 A.E.R. 339. 7. (1916) 2 A.C. 611.

8. (1940) 2 K.B. 561 C.A. see also *Greenwood v. Central Service*, (1940) 2 K.B. 447 C.A.; *Lyons v. Steptoe B.C.*, (1940) 4 A.E.R. 463 C.A.; *Fox v. Newcastle-upon-Tyne C.C.*, (1941) 2 K.B. 120.

a local authority which had erected a street refuge under statutory powers was held not liable for a collision in a black-out night. The authority was no doubt under a statutory duty to keep the street lighted but this duty was abrogated by the Lighting Order, 1939. On the other hand in *Foster v. Gillingham Corporation*¹ a local authority had erected in a highway a barrier near a crater made by a bomb and had placed hurricane lamps on the barrier. On a certain night the lamps were put out by a strong wind and the man in charge did not visit them. In an action for injury to a cyclist and colliding with the barrier, the local authority was held liable on the ground that they had failed in their duty to keep it lighted. The principles of liability of statutory authorities in general should apply to highway authorities also unless there is anything special in the Highways Act in question making a difference. In the well-known case of *Mersey Docks and Harbour Board v. Gibbs*,² it was held that a dock company incorporated by statute was under a common law duty to use reasonable care to keep the dock in proper condition and liable for injury to a vessel which struck against a bank of mud in the dock. Similarly a company authorised by statute to construct a canal was held liable for damage due to an obstruction arising from neglect in keeping the canal in proper condition.³ A tramway company was held liable for injury caused by failure to keep the paving between the tram rails in repair,⁴ and a railway company for injury caused by the rails in a level crossing becoming high owing to the surface of the road being worn out by reason of disrepair,⁵ or by failure to repair the road over a bridge.⁶ Actions have been allowed against statutory authorities for damage due to failure to perform the duty to clean a sewer,⁷ to repair sea-banks,⁸ to light a street,⁹ to repair or

1. (1942) 1 A. E. R. 304 C.A. Goddard, L. J. observed that the cases in the previous footnote require re-consideration. See also *Knight v. Sheffield Corporation*, (1942) 167 L.T. 203.

2. (1886) L.R. 1 H.L. 93; see also *Bede Steamship v. River Wear Commissioners*, (1907) 1 K.B. 310; *The Ella*, (1915) P. 111; *Gilbert v. Corporation of Trinity House*, (1881) 17 Q.B.D. 795.

3. *Parnaby v. Lancaster Canal Co.*, (1839) 11 A. & E. 223.

4. *Dublin United Tramways Co. v. Fitzgerald*, (1930) A. C. 99; the neglect of the road authority cannot be pleaded as an excuse; *Ogston v. Aberdeen District Tramways Co.*, (1897) A.C. 111; a road authority which contracts with a tramway authority to make the repair is also liable for injury due to non-repair; even though the tramway has been discontinued; *Browne v. De Luxe Car Services*, (1941) 1 K. B. 549 C. A.; see *Barnett v. Mayor of Poplar*, (1901) 2 K. B. 319; see also *City of Birmingham Tramways v. Law*, (1910) 2 K. B. 965.

5. *Oliver v. N. E. Ry., Co.*, (1874) L. R. 9 C. B. 409; *Hertfordshire County Council v. G. E. Ry.*, (1909) 1 K. B. 368; (1909) 2 K. B. 403. For the duty of a canal company when they build a bridge in a highway, see *Manley v. St. Helen's Canal Co.*, (1858) 2 H. & N. 840; see also *Guilfoyle v. Port of London Authority*, (1932) 1 K. B. 336.

6. *Swain v. S. Ry. Co.*, (1939) 2 K. B. 560 C. A.

7. *Baron v. Portlaine Urban Council*, (1900) 2 Q. B. 583. See Public Health Act, 1936, S. 23.

8. *Corporation of Lyme-Regis v. Henley*, (1834) 2 Cl. & F. 331.

9. *Carpenter v. Finsbury Borough Council*, (1920) 2 K.B. 195

keep in proper condition a water-metre¹ or sewer-lid² or a traffic stud³ in a road, to repair the pavement in a school,⁴ to provide a fire-plug and indicate its situation in a street,⁵ to construct a bridge and keep it in repair.⁶ The use of the terms 'misfeasance' and 'non-feasance' as antonyms in this context is misleading, as a misfeasance often consists in an omission to take precautions. For instance in *Simon v. Islington Borough Council*⁷ the defendants, a highway authority, were held liable for allowing a tramway line to be in such a condition that a lad riding a bicycle was upset by it and when he fell down was run over by a bus and killed. An action by his representatives was allowed on the ground that the conduct of defendants in keeping the track in disrepair without removing it after it had been abandoned by the tramway authority was a positive act and the reverse of non-feasance.

17. Rule as to non-repair of highways in India.—In India, an action does not lie against the Government for damage arising from misfeasance or non-feasance in the management of roads vested in it, because in maintaining them the Government is regarded as acting in its sovereign capacity.⁸ But local authorities like municipalities or district boards on whom the ownership of streets and roads has devolved by various provincial enactments do not possess any such immunity,⁹ and have been held liable for misfeasance.¹⁰ There was a tendency at one time to follow the English rule of immunity for non-feasance¹¹ but in view of its peculiar history in England it should not be regarded as having general application elsewhere.¹²

18. Disturbance of incorporeal rights in immovable property.—Of such rights easements form an important class and a disturbance of

1. *Blackmore v. Vestry of Mile End Old Town*, (1882) 9 Q.B.D. 451.
2. *White v. Hinderly Local Board of Health*, (1875) L. R. 10 Q.B. 219; *Papworth v. Battersea Corporation*, (1914) 2 K.B. 89; (1916) 1 K.B. 583.
3. *Spilton v. Epsom U. D. C.*, (1937) 1 K.B. 112.
4. *Ching v. Surrey County Council*, (1910) 1 K.B. 736; see also *Morris v. Carnarvon County Council*, (1910) 1 K.B. 840.
5. *Dawson v. Bingley Urban District Council*, (1911) 2 K.B. 149.
6. *Guilfoyle v. Port of London Authority*, (1932) 1 K.B. 336.
7. (1943) 1 K.B. 188 C.A.
8. *Secretary of State for India v. Cockcroft*, (1914) I.L.R. 39 Mad. 351; see below, Chap. XVI, para. 29.
9. *Municipal Council of Vizagapatam v. Foster*, (1918) I.L.R. 41 Mad. 538.
10. *Corporation of Calcutta v. Anderson*, (1884) I.L.R. 10 Cal. 445; *Rajendralal v. Surat City Municipality*, (1908) I.L.R. 33 Bom. 393; 10 Bom. L.R. 493; *Dholka Town Municipality v. Desaihai*, (1913) I.L.R. 38 Bom. 116; 15 Bom. L.R. 1034; *Municipal Council of Vizagapatam v. Foster*, above.
11. *Achralal v. Ahmedabad Municipality*, (1904) I.L.R. 28 Bom. 340. See also *Dholka Municipality v. Patel Desabhai*, (1913) I.L.R. 38 Bom. 116; *Rahim Baksh v. Municipal Board*, 1939 All. 213.
12. *Subramanyam v. District Board*, 1941 Mad. 733.

them is spoken of as a nuisance. In the mediæval common law many other incorporeal rights like franchises of ferry, market or fishery, offices and corrodies were protected by the action on the case of nuisance.¹ At the present day they fall to be considered under other divisions of law than that of nuisance in the law of torts. The law of easements has also grown into a special branch of law, and has been codified in India by the Indian Easements Act.² An easement is a right of a person in possession of land to do something, or to prevent something being done, on another's land,³ e.g., a right of way, right to light. It belongs to the class of rights known in the Roman law as *jura in re aliena* or servitudes. In the Indian Easements Act easements are described as restrictions of natural rights.⁴ A right to purity of water in a natural stream is a natural right but the right to pollute it by discharging the refuse of a factory is an easement. In England the word 'easement' is used as inclusive of natural rights which are spoken of as 'natural easements.'⁵ Again under the Act an easement includes but in England⁶ it excludes *profits a prendre*, e.g., the right to graze cattle on another's land, to take leaves, quarry or soil from it. While natural rights are incident to the possession of every occupier of land, easements and *profits a prendre* have to be acquired by grant, prescription or custom.⁷ Under the English law and under the Indian Easements Act the list of natural rights and easements is well defined, e.g., natural rights of support, of flow, user or purity of water in natural streams, easements of way, and light.⁸ They do not recognise any natural or acquired right to an unobstructed view or prospect,⁹ to the free passage of light or air to an open space of ground or otherwise than through apertures like doors or windows, to surface water not flowing in a stream and not permanently collected in a pool or tank, or to underground water not passing in a defined channel.¹⁰ The law of England does not recognise a right of privacy,¹¹ i.e., a right of an owner of a house to prevent his neighbour from building so as to overlook the rooms in his house. Under the Indian Easements Act¹² such a right may be acquired by local custom, as in those parts of the country where the custom of seclusion of women prevails, e.g., Gujerat in the Bombay Presidency, the United

1. P. & M., Vol. II, p. 124; "The realm of mediæval law is rich with incorporeal things"; see above, p. 2.

2. Act V of 1882. It applied only to certain provinces like Madras, Central Provinces and Coorg, and was extended by Act VIII of 1891 to Bombay, N.W. Provinces and Oudh. It does not apply to Bengal or the Punjab. 3. S. 4. 4. S. 7.

5. Goddard, Easements, p. 3; Salmond, Torts, p. 252; Gale, Easements, p. 6.

6. Gale, Easements, p. 1; Goddard, Easements, p. 3.

7. Ss. 8 to 19. 8. Ss. 7, 15.

9. *Kurusu Kestha v. Thommai*, (1910) 20 M.L.J. 367; 6 I.C. 780; *Sarofini v. Krishna*, (1922) 36 C.L.J. 406; 1923 Cal. 256. 10. S. 17.

11. *Jones v. Taplin*, (1862) 12 C.B.N.S. 826, 842; the right may exist under a covenant; *Lord Manners v. Johnson*, (1875) 1 Ch. D. 673. 12. S. 18, Illustration (b).

Provinces, and the Punjab.¹ As the law relating to natural rights and easements was developed through the action on the case of nuisance, disturbances of these antithetical rights are called 'nuisances.'² Pollution of a stream is a nuisance, but if an easement to pollute it has been acquired, the disturbance of the easement is also technically a 'nuisance.' But the modern law of nuisance is concerned with defining the measure of natural rights to the enjoyment of property without disturbance by others. Therefore it has little in common with the law of easements strictly so called, which relates mainly to the mode of acquiring them. The right to light can only be acquired as an easement but, as we will see later,³ a disturbance of it has been assimilated to the category of nuisance and its historical connection with the old remedy maintained by a decision of recent times.⁴ We will discuss briefly the following rights :—

- (i) rights in respect of water,
- (ii) right of support,
- (iii) right to light,
- (iv) right to air.

19. Rights in respect of water.—The following cases have to be noticed :—

- (i) natural streams ;
- (ii) artificial streams ;
- (iii) underground watercourses ;
- (iv) the sea, lakes and ponds ; and surface water not flowing in any defined course.

20. Natural streams.—In the case of natural streams or rivers the owners of riparian land, *i.e.*, land abutting the stream⁵ have certain rights, known as 'riparian rights' to the user, flow and purity of the water. These

1. Bombay : *Manishankar v. Trikam*, (1867) 5 Bom.H.C.R. (A.C.J.) 4 ; *Maneklal v. Mohanlal*, (1919) I.L.R. 44 Bom. 496. United Provinces : *Gokal Prasad v. Radho*, (1888) I.L.R. 10 All. 358, 387 ; *Nihalchand v. Bhagwan Dei*, 1935 All. 1002 ; *Sardar Hussain v. Ahmad Hussain*, (1928) 110 I.C. 693 (Oudh). The Punjab : *Nihalchand v. Maulu*, (1903) P.L.R. 108 ; *Shah Mohammad v. Ramsan*, 1921 Sind 155. But not in Madras : *Suyyad Asuf v. Amcerubibi*, (1894) I.L.R. 18 Mad. 163 ; nor in Bengal : *Sarofini v. Krishna*, (1922) 36 C.L.J. 406 ; 1923 Cal. 256.

2. Gale, Easements, p. 393 ; Holdsworth, Vol. III, p. 156 ; Vol. VII, p. 331.

3. Below, para. 30.

4. *Colls v. Home and Colonial Stores*, (1904) A. C. 179 ; see also *Higgins v. Betts*, (1905) 2 Ch. 210, 215.

5. Whether the contact be vertical or lateral ; *Lyon v Fishmongers' Co*, (1876) 1 A. C. at 673 ; *North Shore Co v. Pion*, (1889) 11 A.C. 612 ; see also *Attwood v. Llay Main Collieries*, (1926) Ch. 444 ; *Port of London Authority v. Convey Island Commissioners*, (1932) 1 Ch. 446.

rights are annexed to the ownership of the riparian land *ex jure naturæ* and are therefore natural rights.¹ They pass on transfer with the riparian land and cannot be detached from it.² The owner cannot use the water for non-riparian land or confer on a non-riparian owner any right to the use of water which the latter can enforce against other owners.³ The latter may, however, enforce it against the grantor. The rights aforesaid are independent of the ownership of the bed or water in the stream.⁴ Under the common law of England the bed of all tidal and navigable rivers vests in the Crown.⁵ The bed of non-tidal rivers is presumed to belong to the owners of land on either side in equal moiety, *usque ad medium flum aquæ*.⁶ Under the common law flowing water is not the property of any person until it is appropriated into his possession as in his reservoir or channel. It is *publici juris* not in the sense of *bonum vacans* which belongs to the first person who appropriates it, but in the sense that the water is the common property and subject to the common use of all the riparian owners or persons having a right of access to it.⁷ These rights are however subject to the paramount power of Government to regulate the distribution of water in all natural rivers and streams.⁸ Actions for injuries to riparian rights of user, flow and purity may now be considered.

21. Injury to riparian right of user. (a) User for non-riparian land.—An action lies for user of water for the purpose of a non-riparian tenement without proof of damage. This was settled in two leading cases

1. *Embrey v. Owen*, (1851) 6 Ex. 353; *Secretary of State for India v. Subbarayudu*, (1931) I.L.R. 55 Mad. 268 (P.C.); 89 I.A. 56.

2. *Portsmouth Water Works Co. v. London, etc., Ry. Co.*, (1909) 26 I.L.R. 175.

3. *Ormerod v. Todmorden*, (1883) 11 Q.B.D. 155.

4. *Embrey v. Owen*, above; *Jones v. Llancrust, U.C.*, (1911) 1 Ch. 393.

5. *Lyon v. Fishmongers' Co.*, (1876) 1 A.C. at 682; *Narash Narayan v. Secretary of State for India*, (1923) I.L.R. 50 Cal. 446, 41 (P.C.): 50 I.A. 121; *Dawood Hashira v. Tuck Strun*, (1931) I.L.R. 9 Rang. 122.

6. *Bristow v. Cormican*, (1878) L.R. 3 A.C. 641; *City of London Land Tax Commissioners v. Central London Ry. Co.*, (1913) A.C. 364, *Venkata v. Secretary of State*, (1917) I.L.R. 41 Mad. 840, 35 M.L.J. 159. The presumption may be displaced, see, e.g., *Hindson v. Ashby*, (1896) 2 Cl. at p. 9, *Hunbury v. Jenkins*, (1901) 2 Ch. 401 (bed belongs to owner of a several fishery); *Duke of Devonshire v. Pattinson*, (1888) 20 Q.B.D. 263, (bed excluded from grant).

7. *Mason v. Hill*, (1833) 5 B. & Ad. 19, *per* Lord Denman; see also *Embrey v. Owen*, above.

8. Indian Easements Act, s. 2. A ryotwari proprietor has only a right to his accustomed supply and cannot assert a right to user as against Government. *Maduranayakam v. Secretary of State*, I.L.R. 1939 Mad. 483; 1939 Mad. 386; *Narasimha Iyengar v. Kuppuswamy*, 1937 M.W.N. 812. He can do so however against another proprietor; *Secretary of State v. Bulwant*, (1903) I.L.R. 28 Bom. 105; 5 Bom.L.R. 790. But a zemindar or inamdar has these rights even against Government; *Subbarayudu v. Secretary of State for India*, (1927) 53 M.L.J. 868; (1931) I.L.R. 55 Mad. 268 (P.C.): 53 I.A. 56; *Secretary of State v. Sri Varada Thirtha Swamikal*, I.L.R. (1942) Mad. 893; (1942) 2 M.L.J. 367.

in England. In *Swindon Water Works Co. v. Wilts Canal Co.*,¹ a water works company was held to have no right to take water from a river and store it in a reservoir for supplying the residents of an adjoining town and was restrained by an injunction. In *McCartney v. Londonderry Railway Co.*,² a railway company was restrained from taking water through pipes to non-riparian land many miles off for the consumption of their engines. The same rule applies in India.³ But it is here subject to one important exception, *viz.*, where the Government makes a diversion for non-riparian land in exercise of its powers of distribution, an action will lie only on proof of damage, *e.g.*, deprivation of accustomed supply.⁴

(b) **Excessive user for riparian land.**—An action lies for user for riparian land by way of abstraction of water for irrigation or manufacture on proof of material injury or damage to lower owners; but no action will lie even though such damage is caused by user for domestic purposes of the riparian owner. In the English case-law⁵ user for domestic purposes⁶ is spoken of as 'ordinary user,' while user for irrigation and manufacture as 'extraordinary user.' Material injury is proved by diminution of the plaintiff's due share of the water in a stream.⁷ It would be presumed where the defendant's user is so excessive that damage to the plaintiff and other lower owners is inevitable.⁸ Whether such injury exists is a question of fact depending on the size of the stream, the quantity of water abstracted, the water available for other owners,⁹ etc. In the decision of this question different results would be reached in the different climatic and economic conditions of countries like England and India. Therefore

1. (1875) L. R. 7 H. L. 697; no action lies if the user is trivial; *Orr Ewing v. Colquhoun*, (1877) 2 A. C. 839; or if it would cause no damage at any time by reason of the water being returned into the stream unaltered in quantity; *Kensit v. G. E. Ry. Co.*, (1884) 27 Ch. D. 122. 2. (1904) A. C. 301.

3. *Venkadri v. Seetharamayya*, I. L. R. 1939 Mad. 45; 1938 Mad. 816

4. *Robert Fischer v. Secretary of State for India*, above. Cf. *Secretary of State for India v. Zemindar of Sap'ur*, 1938 Mad. 180; 46 L. W. 862.

5. *Miner v. Gilmour*, (1858) 12 Moo. P. C. 131, 156, *per* Lord Kingsdown who first made this distinction.

6. They include the watering of cattle; as to the phrase "domestic purpose," see *A. G. v. G. E. Ry. Co.*, (1870) 23 L. T. N. S. 344; affirmed L. R. 6 Ch. 572. A municipal authority taking water for the domestic use of the residents on the banks of a river is not making such use; *Swindon Water Works v. Wilts Canal Co.*, (1875) L. R. 7 H. L. 697; *Roberts v. Gwyrfa District Council*, (1899) 2 Ch. 608; *Farnham, Waters*, Vol. I, s. 137.

7. *Sampson v. Hoddinott*, (1857) 1 C. B. N. S. 590; *Young v. Bankier*, (1893) A. C. p. 698, *per* Lord Macnaghten.

8. *Attwood v. Llay Main Collieries*, (1926) Ch. 444, 460; *Basavana Gowd v. Narayana*, (1930) I. L. R. 54 Mad. 793; 61 M. L. J. 563.

9. *Embrey v. Owen*, (1851) 6 Fx. 369; *Miner v. Gilmour*, (1858) 12 Moo. P. C. at p. 155; *Swindon Water Works Co. v. Wilts Canal Co.*, (1875) L. R. 7 H. L. 697; *McCartney v. Londonderry Ry. Co.*, (1904) A. C. 301.

the case-law of England is not an absolute guide in this country. In England the prime need is the even flow of water for purposes of power for mills and factories, and courts therefore allow diversion on condition that the water is substantially returned to the stream,¹ a condition which is obviously impracticable in cases of irrigation in a hot climate. In India courts allow a liberal use of water for irrigation.² No doubt a riparian owner cannot dam up a stream and impound all the water and leave only what is left after his requirements.³ But in particular cases diversion of water to riparian lands or storage tanks in them by means of dams may be a reasonable mode of user.⁴

22. Interruption of flow.—An action lies for interruption of the flow of water by reason of a structure on the bed of a stream, on proof of material alteration in quantity, direction, or force.⁵ It is unnecessary to prove any actual injury or damage.⁶ But the interruption must not be trivial, as where a small boat-house is built on a part of the bed of a big river.⁷ When the structure is an encroachment on the bed belonging to another owner, it is not merely a nuisance but a trespass and actionable *per se*. When an encroachment is on the bed of a navigable river belonging to the Crown, it is a public nuisance and a punishable offence.⁸ The interruption

1. *Wright v. Howard*, (1823) 1 L.J. Ch. 94; *Norbury v. Kitchen*, (1863) 3 F. & F. 292; *Nuttall v. Bracewell*, (1866) L.R. 2 Ex. 1; *Swindon Water Works Co. v. Wilts Canal Co.*, above; *Pirie v. Earl of Kintore*, (1906) A.C. 478, 484.

2. *Lakshminarasu v. Secretary of State for India*, (1917) 34 M.L.J. 223 : 43 I.C. 113; see also *Devi Pershad v. Joynath*, (1897) I.L.R. 24 Cal. 865 P.C. : 24 I.A. 60; *Eshan v. Nilmoni*, (1908) I.L.R. 35 Cal. 851; *Srinath v. Dinabandhu*, (1914) I.L.R. 42 Cal. 489 P.C. : 41 I.A. 221; *Narayan v. Keshav*, (1898) I.L.R. 23 Bom. 506; *Dinekar v. Narayan*, (1905) I.L.R. 29 Bom. 357 : 7 Bom.L.R. 265; *Kushal Bai v. Secretary of State for India*, (1925) 28 Bom.L.R. 614 : 1926 Bom. 358; *Mahant Krishna v. Bhawani*, (1917) 3 Pat.L.J. 51 : 43 I.C. 235; *Kandan v. Rama Muduli*, 1926 Mad. 1052; *Jugal Sarkar v. Mangal Prasad*, 1926 Pat. 187; *Pydimarri Buchi Venkata v. Suri Venkata*, 1929 Mad. 25; *Murli v. Hanuman*, I.L.R. 58 All. 981 : 1936 All. 520 (use for mill).

3. *Devi Pershad v. Joynath*, (1897) I.L.R. 24 Cal. 865 (P.C.) : 24 I.A. 60; *Jagannadharaju v. Rajah of Visianagaram*, I.L.R. 1937 Mad. 510 : 1937 Mad. 310 F.B.

4. *Collector of Nasik v. Shamji*, (1878) I.L.R. 7 Bom. 209; *Orr v. Raman*, (1893) I.L.R. 18 Mad. 320 : 4 M.L.J. 248; *Venkataratnamma v. Secretary of State for India*, (1914) I.L.R. 37 Mad. 364, 369 to 371 : 23 M.L.J. 109; *Secretary of State for India v. Ambalavana*, (1917) 33 M.L.J. 415, 423 : 42 I.C. 697; *Secretary of State for India v. Surayya*, (1928) 53 M.L.J. 649, 652, *per* Jackson, J (irrigation is ordinary use); *Sethuramalinga v. Ananda*, (1934) 67 M.L.J. 373 : 1934 Mad. 583. See below, para. 85.

5. Indian Easements Act, s. 7, Illustration (h); *Bickett v. Morris*, (1866) L.R. 1 H.L. Sc. 47; *English v. Metropolitan Water Board*, (1907) 1 K.B. 588, 602; *Provender Millers Ltd. v. Southampton C. C.*, (1939) 4 A.E.R. 187 C.A.; *Jagannadharaju v. Rajah of Visianagaram*, above; *Lankapura Tea Co., Ltd. v. Gopalpur Tea Co. Ltd.*, (1936) I.L.R. 63 Cal. 1008 : 40 C.W.N. 916.

6. *Roberts Gwyrfaï, D. C.*, (1899) 2 Ch. 608; *McGlone v. Smith*, (1888) 22 L.R. Ir. 559; *Seetharamachandra v. Satyanarayana*, 1940 Mad. 656.

7. *Orr Ewing v. Colquhoun*, (1877) 2 A.C. 839, 859; *Booth v. Ratte*, (1889) 15 A.C. 188; see also *Kali Kishan v. Jodolal*, (1879) L.R. 6 I.A. 190 : 5 C.L.R. 97.

8. *A.G. v. Earl of Lonsdale*, (1868) L.R. 7 Eq. 379.

of flow by user for riparian land is actionable only if the user is unreasonable, as the right to flow is subject to the correlative right of others to use the water.¹ In such cases the plaintiff must prove material damage, e.g., flooding of adjoining lands² or excessive abstraction of water. A person is entitled to put up an embankment on his land to protect it from an unusual flood,³ unless others have a prescriptive or customary right that he should receive the overflow.⁴ He is also entitled to remove it and does not commit a breach of duty to a neighbour whose land is flooded by the deprivation of the protection till then afforded by the embankment or wall.⁵

23. Pollution of water.—An action lies for pollution of water,⁶ e.g., rendering the water noxious or unfit for use, making soft water hard,⁷ altering its temperature,⁸ discharging substances which though harmless in themselves become noxious by combination with other things in the water or discharged into it by others.⁹ The pollution must be material or appreciable, and not trifling.¹⁰ It is actionable without proof of actual damage, as it is *per se* an injury to his right of user.¹¹ The plaintiff can recover compensation for any actual damage sustained¹² and is ordinarily entitled to an injunction for stopping the pollution, though it may involve great expense in the alteration or removal of works or factories.¹³ Injunctions

1. *Per Erle, C.J. in Gaved v. Mariyn*, (1865) 19 C.B.N.S. 732.

2. *Menzies v. Breadalbane*, (1828) 4 Bligh. N.S. 414, 418; *Venkatachalam v. Zamin-dar of Sivaganga*, (1903) I.L.R. 27 Mad. 409; 14 M.L.J. 162; *Baldeo v. Jugat*, (1911) I.L.R. 33 All. 619; 8 A.L.J. 640; *Maung Bya v. Maung Kyi*, (1925) I.L.R. 3 Rang. 494 (P.C.): 52 I.A. 385.

3. *Nield v. L.N.W. Ry. Co.*, (1874) L.R. 10 Ex. 4; *Gerrard v. Crowe*, (1921) 1 A.C. 395; *Maharaja of Venkatagiri v. Secretary of State for India*, (1914) 28 M.L.J. 98; 26 I.C. 800; *Shidramappa v. Mahomed*, (1920) 22 Bom. L.R. 1107; 59 I.C. 391; *Ma Hti v. Moksod*, (1924) I.L.R. 2 Rang. 430.

4. *Venkatachalam v. Zemindar of Sivaganga*, (1903) I.L.R. 27 Mad. 409; 14 M.L.J. 162.

5. *Thomas & Evans, Ltd., v. Mid-Rhondia v. Co-operative Society*, (1941) 1 K.B. 381 C.A.

6. *Magor v. Chadwick*, (1840) 11 A. & E. 571; *Hood v. Waud*, (1849) 3 Ex. 748. As to the value of scientific evidence for proof of pollution, see *Goldsmid v. Tunbridge Wells*, (1866) L.R. 1 Ch. 349, 353; *Chicago Drainage case* cited in Joyce, Nuisances, s. 299.

7. *Young v. Bankier*, (1893) A.C. 691.

8. *Mason v. Hill*, above; *Tipping v. Eckersley*, (1855) 2 K. & J. 264; *Ballard v. Tomlinson*, (1885) 29 Ch. D. 115. C.A. 9. *Blair v. Deakin*, (1887) 57 L.T. 522.

10. *Lillywhite v. Trimmer*, (1867) 36 L.J. Ch. 525; *A. G. v. Gee*, (1870) L.R. 10 Eq. 131; *A. G. v. Cockermouth, L. B.*, (1874) L.R. 18 Eq. 172.

11. *Jones v. Llanrwst Urban Council*, (1911) 1 Ch. 393; *Stollmeyer v. Petroleum Development Co.*, (1918) A.C. 485; *Nicholls v. Ely Beet Sugar Factory*, (1936) Ch. 343.

12. *Harrington v. Derby Corporation*, (1905) 1 Ch. 205; *Hobart v. Southend-on-sea Corporation*, (1906) 75 L.J.K.B. 305; *Tatton v. Staffordshire Potteries Water Works Co.*, (1879) 44 J.P. 106.

13. *Pennington v. Brinsop*, (1877) 5 Ch. D. 769; see also *A. G. v. Leeds Corporation*, (1870) L.R. 5 Ch. 583; *cf. A. G. v. Colney Hatch Lunatic Asylum*, (1868) L.R. 4 Ch. 146, 154

have been granted in England in numerous cases against owners of factories discharging their refuse,¹ and against local or municipal authorities discharging sewage into rivers and streams.² In the former class of cases it was held to be no excuse that the stream was already polluted by others,³ or that the defendant carried on the manufacture properly and without negligence,⁴ or that there was no other outlet,⁵ or that an important industry would be injured by the grant of an injunction.⁶ In the latter class of cases, it was held to be no defence that the local authority acted not for profit but for the benefit of a large population, or that it had statutory authority to drain a city.⁷ An action does not lie against a local authority for pollution of a stream due merely to non-performance of a statutory duty to provide a proper system of drainage, when the statute furnishes another remedy for enforcing the duty.⁸ But an action lies if there is a misfeasance by negligent performance of an authorised work.⁹ It is necessary to observe that pollution of water may furnish different causes of action. It may be merely an injury to the riparian right of user. In that case the action may be brought by the person in actual possession,¹⁰ or

1. *Crossley v. Lightowler*, (1867) L.R. 2 Ch. 478; *Pennington v. Brinsop*, above; *Hulley v. Silversprings etc., Co., Ltd.*, (1922) 2 Ch. 263.

2. See *Manchester, Sheffield &c., Ry. Co. v. Workshop Board of Health*, (1857) 23 Beav. 198; *A. G. v. Birmingham B. C.*, (1858) 4 K. & J. 528; *Bidder v. Croydon Local Board*, (1862) 6 L.T. 778; *A. G. v. Metropolitan Board of Works*, (1863) 1 H. & M. 298; *Goldsmid v. Tunbridge Wells*, (1866) L.R. 1 Ch. 349; *A. G. v. Colney Hatch Lunatic Asylum*, (1868) L.R. 4 Ch. 146; *A. G. v. Leeds Corporation*, (1870) L.R. 5 Ch. 583; *A. G. v. Hackney Local Board*, (1875) L.R. 20 Eq. 626; *A. G. v. Birmingham Drainage Board*, (1910) 1 Ch. 48; (1912) A.C. 783.

3. See cases in note 2; but otherwise if the stream is so polluted that an injunction against the defendant will not restore any benefit to the plaintiff; *Wood v. Sutcliffe*, (1861) 21 L.J. Ch. 255.

4. *Stockport Water Works Co. v. Potter*, (1864) 7 H. & N. 160; see cases in notes 2 and 3.

5. See cases in note 2.

6. *Stollmeyer v. Petroleum Development Co.*, above.

7. See cases in note 2 and also, *Bell v. Chesham U.C.*, (1921) 3 K. B. 427; but if the statute allows a sanitary authority to pour sewage into a stream after adopting the best process to purify it, the statute is a good defence though the best process adopted is imperfect; *Lea Conservancy Board v. Mayor of Hertford*, (1834) 43 J. P. 628; *Price's Patent Candle Co. v. London County Council*, (1908) 2 Ch. 526, 543.

8. *Glossop v. Heston Local Board*, (1876) 12 Ch. D. 102; see also *Robinson v. Workington Corporation*, (1897) 1 Q. B. 619; *Craig v. Woolwich Borough Council*, (1920) 36 T.L.R. 639; *Hesketh v. Birmingham Corporation*, (1924) 1 K. B. 260. An injunction will not be issued to compel the defendants to sue others to stop a nuisance; *A. G. v. Clerkenwell Vestry*, (1891) 3 Ch. 527; as to liability where the sewage system devolved on the defendants from a previous authority, see *Jones v. Llanrust*, (1911) 1 Ch. 393; *Rochford D. C. v. Port of London Authority*, (1914) 2 K. B. 916; see below, Chap. XVII.

9. *Foster v. Warblington Urban Council*, (1906) 1 K.B. 648; see also *Baron v. Portlside Urban Council*, (1900) 2 Q. B. 588; *Boynnton v. Commissioners of the Ancholme Drainage*, (1921) 2 K. B. 213; *Syed Masaffar v. Lahore Municipality*, 1941 Lah. 453; see above, para. 16.

10. *Stockport Water Works v. Potter*, (1864) 3 H. & C. 300; see also *Whaley v. Laing*, (1857) 2 H. & N. 476; 3 H. & N. 675, 901,

having an easement or other legal interest in the stream like a right of fishing.¹ It may also be brought by a reversioner if the pollution is permanent or such as would, if allowed to continue, ripen into an easement.² A licensee has no interest in property and cannot therefore sue for injury to a riparian right,³ but may have some other cause of action like nuisance or negligence resulting in injury to person, property or comfort. Similarly an owner or occupier of non-riparian land or land abutting not merely natural streams but also artificial streams,⁴ lakes or ponds, or having underground sources of supply⁵ like a well, may sue for injury to their property by pollution. There would of course be no right to complain of damage caused by use of the water, if the plaintiff had no right to use it⁶ or used it with knowledge of the pollution.⁷ If the pollution is a public nuisance under common law or statute,⁸ any member of the public may be able to sue for special damage. The right of suit cannot be lost by long continuance of the nuisance.⁹ Pollution may also amount to a trespass as where noxious matter is discharged into a stream and ultimately on the lands of another.¹⁰

24. Easements in natural streams.—An easement or a restriction of one or more of the rights discussed above may be acquired, *e.g.*, an easement to divert water by means of a dam,¹¹ to obstruct the flow and flood the lands of other owners,¹² or to pollute water.¹³ The rules relating to the acquisition and incidence of easements in general would apply to these easements also and need not be discussed here. A few points may be noticed in the present context in connection with acquisition by prescription.

(a) The enjoyment must be as an easement, without interruption, and for

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1. *Fitzgerald v. Firkbank*, (1897) 2 Ch. 96.
 2. *Jones v. Llanrwst Urban Council*, (1911) 1 Ch. 393.
 3. *Stockport Water Works Co. v. Potter*, (1864) 3 H. & C. 300; see *Whaley v. Laing*, (1857) 2 H. & N. 476; 3 H. & N. 675, 901, which however was complicated by questions of pleading and is not a very helpful decision. As to right of a licensee, see above, Chap. IV, para. 32.
 4. *Wood v. Waud*, (1849) 3 Ex. 748.
 5. *Ballard v. Tomlinson*, (1885) 29 Ch. D. 115.
 6. *Paine & Co. v. St. Neots Gas Co.*, (1939) 3 A.E.R. 812 C.A. (the plaintiffs had only a license to sink a well and use the water on another's land without a valid lease).
 7. *Ferguson v. Malvern Urban Council*, above; see also *Harrington v. Derby Corporation*, (1905) 1 Ch. 205.
 8. *E.g.*, Public Health Act, 1875, ss. 17, 68, 69, 70; P.H. Act 1890 (53 and 54 Vict. c. 59), s. 47; P.H. Act, 1936.
 9. *Butterworth v. West Riding of Yorkshire Rivers Board*, (1909) A.C. 45, 53; *George Legge & Son v. Wenlock Corporation*, (1938) A.C. 204.
 10. *Jones v. Llanrwst Urban Council*, (1911) 1 Ch. 393.
 11. *Venkanna v. Swetachalapathi*, (1931) I.L.R. 54 Mad. 427 (P.C.); 58 I.A. 195; *Kalu Khabir v. Jan Meah*, (1901) I.L.R. 29 Cal. 100; *Eshan v. Nilmoni*, (1903) I.L.R. 35 Cal. 851.
 12. *Subramania v. Ramachandra*, (1877) I.L.R. 1 Mad. 335; *Venkatachalam v. Zemin-dar of Sivaganga*, (1903) I.L.R. 27 Mad. 409, 413; 14 M.L.J. 162.
 13. *Crossley v. Lightowler*, (1867) L.R. 2 Ch. 478.

twenty years.¹ Therefore a diversion of water for irrigation must have been such as to cause material injury during the whole of that period. In the case of an easement to pollute water, the Easements Act provides that the said period of twenty years begins when the pollution first prejudices perceptibly the servient heritage.² This is in accordance with the decision in a well-known English case³ in which a local authority was held not to acquire a right to pollute a stream by discharging sewage which was originally that of a small town but later on increased in quantity owing to the extension and growth of the town and began to affect prejudicially the plaintiff's estate. (b) The dominant owner cannot increase the burden of the easement on the servient tenant,⁴ e.g., by increasing the size of a dam for diversion of water. The user which originated the prescriptive right will also be its measure,⁵ and if it is exceeded, there is a right of action.⁶ (c) A right to commit a public nuisance cannot be acquired by prescription.⁷

25. Artificial channels.—In artificial channels,⁸ owners of lands abutting them have no natural rights to the use of water or to its flow but may acquire easements,⁹ either as against other persons owning lands above or below,¹⁰ or as against the maker or owner of the channel.¹¹ In

1. *Krista Das v. Joy Narain*, (1903) 8 C.W.N. 158; *Ghasiram v. Asirbad*, (1910) 15 C.W.N. 259; 9 I.C. 69; *Maharajah of Venkatagiri v. Ardhmalai*, 1937 Mad. 953; mere ownership of a dam will not give a right to use up the whole stream; *White v. White*, (1906) A.C. 72. 2. S. 15, Explanation IV.

3. *Goldsmit v. Tunbridge Wells Improvement Commissioners*, (1865) L.R. 1 Eq. 161, per Romilly, M.R.; L.R. 1 Ch. 349, per Turner, L.J.; see also *A. G. v. Acton Local Board*, (1882) 22 Ch.D. 221; *Liverpool Corporation v. Coghill*, (1918) 1 Ch. 307.

4. *Frechette v. Hyacinthe*, (1883) 9 A.C. 170.

5. *Crossley v. Lightowler*, (1867) L.R. 2 Ch. 478 at 481, per Lord Chelmsford.

6. *A. G. v. Leeds Corporation*, (1870) L.R. 5 Ch. 583; *Baxendale v. McMurray*, (1867) L.R. 2 Ch. 790; *Clarke v. Somersetshire Drainage Commissioners*, (1889) 59 L.T. 670; *Secretary of State for India v. Zemindar of Saptur*, 1938 Mad. 180.

7. *Butterworth v. West Riding of Yorkshire Rivers Board*, (1909) A.C. 45, 53; *Hulley v. Silversprings*, (1922) 2 Ch. 268; *Kudhiram v. Surendra*, (1913) 19 C.L.J. 42; 21 I.C. 857; above, p. 179, note 9.

8. *Gaved v. Martin*, (1865) 19 C.B.N.S. 732, *Nuttall v. Bracewell*, (1866) L.R. 2 Ex. 1; *Holkar v. Poritt*, (1873) L.R. 8 Ex. 107; *Roberts v. Richards*, (1882) 50 L.J. Ch. 297; 44 L.T. 271; *Mostyn v. Atherton*, (1899) 2 Ch. 360; an artificial dam or culvert will not change a natural into an artificial stream; *White v. White*, (1906) A.C. 72; per Sargant, J. in *Maxwell Willshire v. Bromley Rural Council*, (1918) 87 L.J. Ch. at p. 243.

9. *Rameshur v. Koonj Behari*, (1878) I.L.R. 4 Cal. 633, 641-2, 643-4; 6 I.A. 33; *Maving Bya v. Maung Kyi*, (1925) I.L.R. 3 Rang. 494 (P.C.); 52 I.A. 385; *Esu v. Ladu*, (1926) I.L.R. 51 Bom. 243; 29 Bom.L.R. 291; *Bepin v. Ramath*, (1929) I.L.R. 56 Cal. 161; *Narasimhulu v. Bha.rayya*, (1932) 36 L.W. 688; 1933 Mad. 10; *Raman Nair v. Parameswaran*, 1934 Mad. 683; *Ghulam Mohideen v. Secretary of State*, 1935 Mad. 700; *Rajniti v. Takh Narain*, 1931 Pat. 232. 10. *Schwann v. Cotton*, (1916) 2 Ch. 459, 468.

11. *Arkwright v. Gell*, (1839) 5 M. & W. 203; *Wood v. Waud*, (1849) 3 Ex. 748; *Greatrex v. Hayward*, (1853) 8 Ex. 291; *Chamber Colliery Co. v. Hopwood*, (1886) 32 Ch. D. 549; *Burrows v. Lang*, (1901) 2 Ch. 502.

the latter case the channel should not be temporary or precarious but must be of a permanent character so that a grant of an easement by its maker to persons using it may be presumed.¹ But an easement as between owners of land on the stream can be acquired even in the case of temporary streams. The owner of land abutting an artificial stream has a right to complain of pollution of the stream,² unless an easement to pollute it has been acquired.

26. Underground water-courses: (a) User and flow.—An underground water-course may or may not flow in a defined and known channel.³ If it does, then rights to user and flow of water arise in it in the same way as in a surface stream.⁴ If it does not, it was settled in England in two well-known cases, that these rights do not exist and cannot be acquired by long user or prescription. In *Acton v. Blundell*,⁵ the plaintiff had a well on his land less than twenty years old and was using its water for his mill. He complained that the water was intercepted by the defendant digging a coal pit on his own land about a mile away. It was held he could not recover. In *Chasemore v. Richards*,⁶ the plaintiff had been using for a long time for his ancient mill the water of a river fed by the rainfall of a large district which percolated through underground strata to the river but in no definite course or channel. The defendant represented the Local Board of Health of Croydon which for the purpose of supplying that town with water sunk a well in their land and pumped large quantities of water, which would otherwise have found its way to the river. It was held that the plaintiff had not acquired a right to the use of underground water intercepted by the defendant. In laying down this rule, the judges relied on a similar rule in the Roman law⁷ and referred also to the practical difficulty of enforcing an obligation on occupiers of land who make use of it by digging in it to avoid interference with subterranean waters whose course and direction cannot be known beforehand.⁸ The rule has been since

1. *Sutcliffe v. Booth*, (1863) 32 L.J.Q.B. 136; *Baily v. Clark*, (1902) 1 Ch. 649, 668 C. A.; *Whitmores, Ltd. v. Stanford*, (1909) 1 Ch. 427; *Barlett v. Tottenham*, (1932) 1 Ch. 114; *Ponnuswamy Tewar v. Collector of Madura*, (1869) 5 M. H. C. 6; *Morgan v. Kirby*, (1878) 1 L. R. 2 Mad. 46; *Madhub v. Jogesh Chunder*, (1902) 1 L. R. 30 Cal. 281; 8 C. W. N. 158; *Ramkirpal v. Hanuman*, 1921 Pat. 51.

2. *Wood v. Waud*, (1849) 3 Ex. 748; *Whaley v. Laing*, (1857) 2 H. & N. 476; 3 H. & N. 675.

3. It is not enough if it is 'defined' but not 'known'; *Bradford Corporation v. Ferrand*, (1902) 2 Ch. 655; see also *Black v. Bullymena*, (1886) 17 L. R. Ir. 459; *Bleashers' Assn. v. Chapel-en-le-Frith, R. C.*, (1933) Ch. 356.

4. *Chasemore v. Richards*, (1859) 7 H. L. C. at p. 374; *Dickinson v. Grand Junction Canal Co.*, (1852) 7 Ex. 282; *Babaji v. Appa*, (1923) 25 Bom. L.R. 789; 1924 Bom. 154.

5. (1843) 12 M. & W. 324.

6. (1859) 7 H. L. C. 349. 7. Dig. 39, 3, *de aqua*, 1, § 12 (Ulpian).

8. *Per Lord Wensleydale in Chasemore v. Richards*, (1859) 7 H. L. C. at p. 387

followed in England¹ and America,² and enacted in India³ by the Easements Act.⁴ But once water has reached a well, it cannot be abstracted or diverted from it, nor can a surface stream be interfered with by underground works.⁵ In *Mayor of Bradford Corporation v. Pickles*,⁶ the House of Lords stretched the rule a little further and held that no action lay against the defendant who intercepted underground springs flowing to the plaintiff's land lower down, though he did so not for using the water for his own land but 'maliciously' with a view to injure the plaintiffs and compel them to buy his land on his own terms. This is a departure from the Roman law⁷ which permitted only reasonable user for improvement of one's property⁸ and not acts done with intent to injure the neighbour.⁹ Prof. Ames has observed that a different rule from that applied in England prevails in many state jurisdictions in America and in France and Germany.¹⁰ Sir Frederick Pollock recommended the contrary rule for India.¹¹ The decision is however not without analogies in the law of easements; for instance no action is allowed against a person who maliciously obstructs the light, air or prospect to which his neighbour had no legal right.¹² The question is ultimately one of legal policy and a choice of evils, but is not of any great practical importance as such disputes are rare. This case is regarded as authority for a wider proposition which is of a rather debatable character, *viz.*, "No use of property, which would be legal if due to a proper motive, can become illegal because it is prompted

1. *New River Co. v. Johnson*, (1860) 2 E. & E. 435; *Ballacorkish Co. v. Harrison*, (1873) L.R. 5 P.C. 49; *M'Nab v. Robertson*, (1897) A.C. 129; *Bradford Corporation v. Ferrand*, (1902) 2 Ch. 655; *English v. Metropolitan Water Board*, (1907) 1 K.B. 588; see also *Reg. v. Metropolitan Board of Works*, (1863) 3 B. & S. 710; *Brain v. Marfell*, (1979) 41 L. T. (N.S.) 455; as to Ireland see *Ewart v. Belfast Guardians*, (1881) 9 L.R. Ir. 172.

2. Cooley, Torts, Vol. II, p. 1201; this principle has been applied to oil in the petroleum-producing districts; Kenny, Cases on Torts, p. 173.

3. The Mahomedan law allowed acquisition by prescription; Hamilton, Hedaya, p. 136; Peacock, Easements, p. 40; *Bagram v. Khettranath*, (1869) 3 B. L. R. O. C. J. at p. 37.

4. S. 7, Explanation to illustration (j) and s. 17, cl. (d). Sub-soil water in a river-bed is like the stream itself and rights can be acquired in it; *Basuvana Gowd v. Narayana*, (1930) I.L.R. 54 Mad. 793; 1931 Mad. 284.

5. *Grand Junction Canal Co. v. Shugar*, (1871) L.R. 6 Ch. 483; *English v. Metropolitan Water Board*, (1907) 1 K. B. 588.

6. (1895) A.C. 587; (1895) 1 Ch. 145 C.A.; (1894) 3 Ch. 53.

7. Above, p. 181, note 7.

8. "*Agrum meliorem faciendi*."

9. "*Non animo vicino nocendi*."

10. Selected Essays on Torts, p. 153; Cooley, Torts, Vol. II, p. 1201; H.C. Gutteridge, Abuse of Rights, 5 Cam. L.J. 22, describes the rule in the above case as "the consecration of the spirit of unrestricted egoism".

11. Torts, (13th ed.) p. 638.

12. The erection of 'spite fences' to obstruct light is a tort in France and Germany and made a tort by statute in at least six American States; Ames, Selected Essays on Torts, p. 154.

by a motive which is improper or even malicious.”¹ The proposition was not apparently intended as a general rule and is in any case too broad to be accepted as such. It is properly applicable to cases like the interception of underground water, obstruction of light, air or prospect. In these cases, the right of the occupier to use his property is absolute and not conditional on his motive. But there may be cases where his motive may be material in deciding whether his user amounts to a nuisance. If he causes noise in his premises, *e.g.*, by having music lessons or by executing repairs, he may not be liable for the discomfort or annoyance thereby caused to his neighbour. But if he causes noise on purpose to annoy or injure his neighbour, his user of property is an actionable nuisance.² In *Keeble v. Hickeringill*,³ the defendant fired guns on his own land with a view to scare away wild fowls which the plaintiff captured in a decoy for the purpose of selling them. In holding the defendant liable for the damage thereby caused to the plaintiff, Holt, C.J., observed that if the defendant had shot on his own land because he had occasion to shoot, it would have been another matter. In *Hollywood Silver Fox Farm v. Emmett*,⁴ the plaintiffs were breeders of silver foxes and the defendant, their neighbour, on account of some difference with them threatened to fire cartridges on his own land and scare the foxes. He did so with the result, as plaintiffs alleged, that one of the vixen refused to mate and another ate her cubs. The plaintiffs were awarded damages and injunction. In these cases the legal right of the occupier is that his comfort is not disturbed by his neighbours otherwise than by the reasonable and therefore non-malicious enjoyment of their property.

(b) **Purity.**—An occupier of land has a right to purity of underground water and can complain of its pollution as a nuisance.⁵

27. Other cases of waters.—(a) **The sea.**—There are two public rights in the sea, *viz.*, navigation and fishing, and as accessory thereto, the

1. (1895) A.C. at p. 598, *per* Lord Watson, who recognised exceptions like burning limestone near the boundary to annoy a neighbour; see also pp. 594, 601, Lords Halsbury and Macnaghten. For the extension of this rule to wrongs generally, see *Allen v. Flood*, (1898) A.C. 1; below, Chap. XI, paras. 15, 24 and 25, and XIII, para. 9.

2. *Christie v. Davey*, (1893) 1 Ch. 316; as to burning limestone, see (1895) A.C. at p. 598; *Bamford v. Turnley*, (1862) 3 B. & S. at p. 83.

3. (1705) 11 Mod. 75; *Ibbotson v. Peat*, (1865) 3 H. & C. 644 (scaring away the plaintiff's game by fireworks).

4. (1936) 2 K.B. 166. It is submitted, with respect, that there is no conflict between this decision and the *Bradford Corporation* case as explained above; Sir William Holdsworth thought there was, but the learned editor of the L.Q.R. differed; see 52 L.Q.R. 460; 53 L.Q.R. 1, 3.

5. *Ballard v. Tomlinson*, (1885) 29 Ch. D. 115; see also *Hodgkinson v. Ennor*, (1863) 4 B. & S. 229; *Womersley v. Church*, (1867) 17 L. T. 190; Indian Easements Act, s. 7, Illustration (f).

right of passage over the shore.¹ Any invasion of these rights is a public nuisance and actionable on proof of special damage.² The ownership of the shore lying below highwater mark of ordinary tides vests in the Crown.³ A person may acquire, subject to the public rights aforesaid, a right of property or other rights⁴ over the shore by a grant from the Crown or by prescription.⁵ He can then sue for disturbance of those rights. For instance a person recovered damages for injury done to his oyster-beds by the defendants, a local authority, discharging sewage into the sea.⁶ An owner of land near the sea can sue for obstruction of his private right of access to the sea for navigation or fishing.⁷ He has also the right to put up an embankment to ward off the inroads of the sea.⁸ The above principles apply to creeks, or other arms of the sea.

(b) **Lakes and ponds.**—In inland lakes and ponds, owners of lands abutting them have rights of user as in the case of natural streams,⁹ and may acquire easements in derogation of such rights.¹⁰

(c) **Surface water not flowing in a defined course.**—In surface water not flowing in a defined course, there are no rights to user and flow as in natural streams; nor can such rights be acquired by prescription.¹¹ An owner of upper land has a right that such water shall be allowed by the

1. Coulson & Forbes, *Law of Waters*, pp. 1-5, 23. There is no public right of bathing in the sea and for that purpose to use the foreshore; *Brinckman v. Matley*, (1904) 2 Ch. 313, C. A.; *Ramsgate Corporation v. Debling*, (1906) 22 T. L. R. 369; *William Ellis v. Cobb*, (1935) 1 K. B. 310; nor to hold public meetings on the foreshore, *Llandudno Urban District Council v. Woods*, (1899) 2 Ch. 705; *Brighton Corporation v. Packham*, (1908) 72 J. P. 318.

2. *Rose v. Miles*, (1815) 4 M. & S. 101; *Smith v. Stair*, (*Earl of*), (1849) 2 H. L. C. 807.

3. *Gann v. Free Fishers of Whitestable*, (1864) 11 H. L. C. 192; *Mayor of Penryn v. Holme*, (1877) 2 Ex. D. 328. As to the bed of the sea in territorial waters, see *A. G. for British Columbia v. A. G. for Canada*, (1914) A. C. 153.

4. *E. g.*, to erect ports and levy tolls; Coulson & Forbes, p. 62; as to the right to take wreck, *ibid.*, p. 53; and Merchant Shipping Act, 1894, s. 523.

5. *Calmady v. Rowe*, (1848) 6 C. B. 861; *A. G. v. Jones*, (1862) 33 L. J. Ex. 249.

6. *Foster v. Warblington Urban Council*, (1906) 1 K. B. 648.

7. *Lyon v. Fishmongers' Co.*, (1876) 1 A. C. 662; *North Shore Co. v. Pion*, (1889) 14 A. C. 612; *Marshall v. Ulleswater Co.*, (1871) L. R. 7 Q. B. 166.

8. *R. v. Commissioners of Sewers of Pagham*, (1828) 8 B. & C. 355.

9. Indian Easements Act, s. 7, Illustrations (k) and (j). As to right of fishing, see *Johnston v. O'Neil*, (1911) A. C. 552.

10. *Jibananda v. Kalidas*, (1914) I.L.R. 42 Cal. 164; 18 C.W.N. 1296; as to easement to take water from wells, see *Ramchander v. Sher Ali*, (1929) 27 A.L.J. 1120; 1929 All. 779.

11. I.E. Act, s. 17 (c); *Adinarayana v. Ramudu*, (1912) I.L.R. 37 Mad. 304; 24 M.L.J. 17.

owner of lower land to run naturally to it.¹ A person may also acquire an easement to collect and discharge water in his land on another's land by means of drains, eaves, etc.² But the owner of lower land would not thereby acquire a right to the continued flow of surface water from upper land.³ Unless he has acquired an easement, a person cannot discharge water artificially brought to his land on his neighbour's.⁴

28. Natural right of support.—Under the English⁵ and the Indian⁶ law, every owner of land has a natural right to the undisturbed support from subjacent or adjacent soil belonging to another. The correlative duty is on the part of every owner of land not to cause a subsidence of the land above or adjacent to his by any act done on his own land. Subject to this condition, he can do what he likes on his own land, dig trenches or mines, cut and carry away earth or minerals from it. If he does such acts on another's land and cause its subsidence, the wrong is not a nuisance but a trespass. The cause of action in trespass is the entry or excavation; in the case of nuisance it is not the excavation itself but the damage by subsidence.⁷ Therefore an action for nuisance may be brought within six years after each subsidence though more than six years after the excavation.⁸ An action for damages will not lie before damage occurs though an injunction.

1. I.E. Act, s. 7 (i); *Subramania v. Ramachandra*, (1877) I.L.R. 1 Mad. 335; *Imam Ali v. Poresk*, (1882) I.L.R. 8 Cal. 468; *Ramadhin v. Jadunandan*, (1914) 19 C.W.N. 54; 27 I.C. 268; *Rhagirathi v. Surajmal*, (1914) 12 A.L.J. 685; 24 I.C. 91; *Sheik Hussain v. Pichipulusu*, (1925) I.L.R. 49 Mad. 441; 50 M.L.J. 377; *Kasia v. Subramania*, (1928) I.L.R. 52 Mad. 426; 56 M.L.J. 311; *Natabar Sasmal v. Krishnachandra*, 1942 Cal. 261 (but not if there is a water-course between the two); *Sheogulam Singh v. Rambahadur*, 1938 Pat. 73; *Jagannath v. Angad*, 1938 All. 363. But not by an artificial discharge; *Venkataraya Aiyar v. Sankaran*, 1938 Mad. 649. Below, Chap. XVIII, para. 23.

2. *Munshi v. Bhimraj*, (1913) I.L.R. 40 Cal. 458; 17 C.W.N. 306.

3. *Mason v. Shrewsbury Ry. Co.*, (1871) L.R. 6 Q.B. 578; *Chamber v. Hopwood*, (1886) 32 Ch. D. 558 per Bowen, L.J.; "It would be difficult to make out that because for twenty years my pump has dripped on to a neighbour's ground, therefore he has a right at the end of twenty years to say that my pump must go on leaking"; see also *Aftab v. Asokhadeen*, (1913) 19 C.L.J. 131; 20 I.C. 315; *Bimolanand v. Chandra Kant*, (1913) 19 C.L.J. 45; 22 I.C. 514; *Ballave v. Bepin Behari*, (1918) 46 I.C. 24 (Cal.); *Baswappa v. Bhimappa*, (1921) I.L.R. 46 Bom. 115; 23 Bom. L.R. 1004; *Sarban v. Phudo Sahu*, 1923 Pat. 65; *Abdul v. Sheo Prakash*, 1928 Pat. 279.

4. *Ramakrishna v. Venkata*, (1927) 39 M.L.T. 373; 1928 Mad. 52; see also *Venkataraya Aiyar v. Sankaran*, 1938 M.W.N. 414; 47 L.W. 564.

5. *Wyatt v. Harrison*, (1832) 3 B. & Ald. 871; *Humphries v. Brogden*, (1848) 12 Q.B. 739; *Howley Park & Co. v. L. & N. W. Ry. Co.*, (1913) A.C. 11 at pp. 25, 27.

6. Indian Easements Act, s. 7, Illustration (e).

7. *Backhouse v. Bonomi*, (1861) 9 H.L.C. 512. It is unnecessary to show any pecuniary loss; *A. G. Conduit Colliery Co.*, (1895) 1 Q.B. 301.

8. *Darley Main Colliery Co. v. Mitchell*, (1886) 11 A.C. 127; *Crumbie v. Wallsend Local Board*, (1891) 1 Q.B. 503. In India the period of limitation would appear to be the same under the Limitation Act, art. 120.

may be obtained,¹ and in assessing damages, prospective damages for future and anticipated subsidences cannot be included.² The action will lie only against the person who brought about the subsidence and not against the person who is the owner at the time of the subsidence.³ Again a person is not liable if the subsidence is due not to removal of subjacent or adjacent soil but to draining off underground water in his own land.⁴ He is, however, liable if the thing drained was not water but wet sand⁵ or pitch.⁶ An action lies on proof that the disturbance or subsidence was the result of the defendant's act. It is unnecessary to prove the defendant's negligence,⁷ nor is absence of negligence any defence.⁸ The defendant cannot plead that the damage was due to the act of an independent contractor.⁹ But it is a good defence that the damage was the result not of his act but of an act of God or of a third party.¹⁰ It is also open to the defendant to show that he had acquired a right to let down the plaintiff's land by prescription,¹¹ grant or statute. The general rule is that there must be clear words in the grant or statute expressly or by necessary implication taking away the common law right of support.¹² The absence of any provision for compensation is usually an indication that the right subsists.¹³ It has, however, been held that in a case of grant of the right to take coal, subsidence is inevitable no matter how the coal is worked and therefore should be deemed to have been authorised by the grant though there was no compensation clause.¹⁴ The right as well as the duty relates to the support of land in its natural condition, *i.e.*, unexcavated or unweighted with buildings on it. In regard to a building there is no natural right of support but an easement of

1. *Ramakrishna v. Sitarama*, (1912) I.L.R. 37 Mad. 527; *Tamluk Trading & Co. Ltd. v. Nabadwipchandra Nandi*, (1931) I.L.R. 59 Cal. 363; *Minus v. Davey*, (1932) I. L. R. 11 Rang. 47. 2. *West Leigh Colliery Co., Ltd. v. Tunncliffe*, (1908) A.C. 27.

3. *Greenwell v. The Law Beechburn Coal Co.*, (1897) 2 Q. B. 165; *Hall v. Duke of Norfolk*, (1900) 2 Ch. 493.

4. *Popplewell v. Hodgkinson*, (1868) L. R. 4 Ex. 248; *English v. Metropolitan Water Board*, (1907) 1 K.B. 588.

5. *Jordeson v. Sutton & Co.*, (1898) 2 Ch. 614; *Fletcher v. Birkenhead Corporation*, (1907) 1 K.B. 205.

6. 54 & 55 Vict. c. 40; *Trinidad Asphalt Co. v. Ambard*, (1899) A. C. 594; *Salt Union v. Brunner*, (1906) 1 K.B. 822.

7. *Haines v. Roberts*, (1857) 7 E. & B. 625.

8. *Per Martin, B.*, in *Brown v. Robins*, (1859) 4 H. & N. 186 at p. 193.

9. *Bower v. Peate*, (1876) 1 Q.B.D. 321; *Hughes v. Percival*, (1883) 8 A.C. 443.

10. *Corporation of Birmingham v. Allen*, (1877) 6 Ch. D. 284.

11. *Rowbotham v. Wilson*, (1860) 8 H.L.C. 348. A custom to let down surface without paying compensation is however void for unreasonableness; see *Hilton v. Granville* (1845) 5 Q.B. 7016; *Wolstanton Ltd. v. Newcastle-under-Lyne Corporation* (1940) A.C. 860.

12. *Butterknowle Co. v. Bishop Auckland & Co.*, (1906) A.C. 313; *Howley Park & Co. v. L. & N. W. Ry. Co.*, (1913) A.C. 1125; *Warwickshire Coal Co. v. Coventry Corporation*, (1934) 1 Ch. 488; *Wath-upon-Deane U.D.C. v. Brown & Co.*, (1936) 1 Ch. 172.

13. See cases in note 12, above.

14. *Welldon v. Butterley Co.*, (1920) 1 Ch. 130, 140.

support by other land or building may be acquired.¹ The natural right of support of land, however, continues though there are buildings on it. When by reason of a neighbour's act a building and its foundation have collapsed, it is open to its owner to show that the foundation would have sunk even in the absence of superincumbent weight.² In such a case, in addition to damages for injury to the land he may also claim compensation for the injury to the building on it as an item of consequential damage due to a wrongful act.³ He cannot, however, do so if it could be proved that the fall of the building was due only to its inherent defect or its own weight.⁴

29. Easement of support.—An easement of support of a building by another's land⁵ or building⁶ may be acquired by grant or prescription. On the latter mode of acquisition the leading authority is *Dalton v. Angus*.⁷ The plaintiffs' house was nearly a hundred years old but twenty-seven years before, it had been altered into a coach factory, in a manner which increased the weight on the wall near the defendants' premises and the lateral pressure on the defendants' soil. The defendants whose house was contiguous to the plaintiffs' pulled it down for building a new one and dug foundations which were deeper than those of the plaintiffs', with the result that the soil near the plaintiffs' foundations was exposed to air and gave way bringing down a considerable portion of the factory. The House of Lords held that the plaintiffs were entitled to damages for the loss as they had acquired a right to support by open and peaceable enjoyment for twenty years. An action for disturbance of the easement of support of a house like that for disturbance of the natural right of support of land does not depend on proof of negligence⁸; nor is absence of negligence or the fault of a contractor any excuse,⁹ nor the fact that a person was required by a local authority to demolish his premises which supported his neighbour's.¹⁰ The defendant is however not liable if he had no notice of his duty; as when by pulling down his wall, he injured a hidden vault of his neighbour which required support, but of which he had no means of knowledge.¹¹ If

1. *Bengal Provincial Ry. Co. v. Rafaneekanta*, (1936) I.L.R. 63 Cal 441; 1936 Cal. 564; *Fidalle v. Akbaralli*, I.L.R. 1939 Bom. 375; 1939 Bom. 210.

2. *Brown v. Robins* (1859) 4 H. & N. 186; *Siddens v. Short*, (1877) 2 C.P.C. 572.

3. *Stroyan v. Knowles*, (1861) 6 H. & N. 454; cf. *Smith v. Thackeray*, (1866) L.R. 1 C.P. 564, as to which see *A. G. v. Conduit Colliery Co.*, (1895) 1 Q.B. at p. 313; *Ambalal v. Bihar Hosiery Mills, Ltd.*, (1937) I.L.R. 16 Pat. 545.

4. *Street*, Vol. I, p. 197.

5. *Dalton v. Angus*, (1881) 6 A.C. 740.

6. *Lemaitre v. Davis*, (1881) 19 Ch. D. 281; *Selby v. Whitbread*, (1917) 1 K.B. 736; *Gordhan Dalpatram v. Chotalal*, (1888) I.L.R. 13 Bom. 79.

7. (1881) 6 A.C. 740. Cf. Indian Easements Act, s. 15.

8. *Bonomi v. Backhouse*, (1859) E. B. & E. 622; 9 H.L.C. 503.

9. *Dalton v. Angus*, (1881) 6 A.C. at p. 829; *Hughes v. Percival*, (1883) 8 A.C. 443.

10. *Bond v. Norman*, (1939) 1 Ch. 847; see also (1940) 1 Ch. 429 C.A.

11. *Chadwick v. Trower*, (1839) 6 Bing. N.C. 1; see also *Iford U. C. v. Beal*, (1925) 1 K.B. 671.

an easement has not been acquired, a house has no right to the support of an adjacent land or building. In the case of such a house usually called a 'modern house,' the owner has no right to complain if at any time within twenty years of its building the owner of adjacent land digs away the soil and allows the house to tumble down.¹ He has, however, a right of action against a person who is not the owner of adjacent soil but a wrongdoer or a trespasser who causes damage.² Even the owner of adjacent soil is under a duty to avoid needless injury to a neighbour's new house by operations on his own land.³ He is not of course bound to take active steps for its support, *e.g.*, by shoring it up.⁴ But there may be in the circumstances a duty to avoid injury by giving notice of the works to the owner of the house.⁵

30. Right to light.—Every owner of land or building has a natural right to the light vertically coming to his property.⁶ But he has no natural right to the light coming laterally to him as it would involve a serious restriction of the natural right of the owner of adjacent land to build on it as he pleases.⁷ He cannot complain even if his neighbour builds maliciously with a view to obstruct light.⁸ Indeed that would be the only method open to the latter to prevent the acquisition of an easement.⁹ He can acquire a right to lateral light, (a) by grant, which in substance would amount to a restrictive covenant by the grantor not to build and shut off his light, (b) by prescription. He can by prescription acquire a right to light only for a building and passing through particular apertures like windows or skylights¹⁰; when the right is acquired the apertures are usually called

1. *Dalton v. Angus*, (1881) 6 A.C. at p. 804, *per* Lord Penzance. See also *In re Athi Iyer*, 1921 Mad. 322; *Abdul Rahman v. Mulchand*, 1928 Nag. 91; *Bhagwan Das v. Mussamat Bibi*, 1929 All. 885; *cf.* Street, Vol. I. p. 196, foot-note 6.

2. *Jeffries v. Williams*, (1850) 5 Ex. 792; *Bibby v. Carter*, (1859) 4 H. & N. 153; *Richards v. Jenkins*, (1868) 18 L.T. 437.

3. See *Southwark etc., Water Co. v. Wandsworth Board of Works*, (1898) 2 Ch. at p. 612, *per* Collins, L.J.; see also *Walters v. Pfeil*, (1829) 1 M. & M. 362; *Dodd v. Holme*, (1834) 1 A. & E. p. 503. The decision in *Mohelal v. Bai Jivkore*, (1904) I.L.R. 28 Bom. 472; 6 Bom. L.R. 529, appears to offend against this principle. It was dissented from in *Mahadeo v. Saraju*, (1932) 30 A.L.J. 758; 1932 All. 573; below, para. 38, note 5.

4. (1898) 2 Ch. at p. 612.

5. *Brown v. Windsor*, (1830) 1 Cr. & J. 20; *Chadwick v. Trower*, (1839) 6 Bing. N.C. 1; as to degree of care of persons who had given notice, see *Massey v. Goyder*, (1829) 4 C. & P. 161; as to the duty of highway or sewer authorities to give notice of works involving danger to adjacent property, see *Jones v. Bird*, (1822) 5 B. & Ald. 837; *cf.* *Grocer's Co. v. Donne*, (1836) 3 Bing. N. C. 34; *Fairbrother v. Bury Rural Sanitary Authority*, (1889) 37 W.R. 544.

6. Indian Easements Act, s. 7, Illustration (d).

7. See Bramwell, L.J. in *Bryant v. Lefever*, (1879) 4 C.P.D. 172, 175.

8. The rule is different in some American States under statute and in France, above, p. 182, note 10.

9. *Sarofini v. Krishna*, (1922) 36 C.L.J. 405, 408, 409.

10. But not doors; *Levet v. Gaslight and Coke Co.*, (1919) 1 Ch. 24; see, however, *Ratanji Bottlewala v. Edalji*, (1871) 8 Bom. H.C. (O.C.J.) at p. 190; *Framji v. Framji*, (1905) 7 Bom. L.R. 352, 370.

'ancient lights.'¹ He cannot acquire a right to light passing to an open land or not passing through definite apertures.² While in the case of a grant³ its terms will determine the extent of the right, the measure of the right acquired by prescription was the subject of controversy in England during the last century and was settled only in 1904. There were two rival views. One was that a person acquired only the right to such light as was necessary for a comfortable or beneficial use of his premises, or a right to be protected from a nuisance.⁴ The other view was that under the Prescription Act, 1832, a person got after twenty years' user a right to all the light which used to pass through his windows and could complain of any diminution of it.⁵ This conflict was settled in the case of *Colls v. Home & Colonial Stores, Ltd.*⁶ There the House of Lords rejected the latter theory on the ground that the Act of 1832 did not introduce any new right but only fixed the period of long user at twenty years and that whether by proof of immemorial enjoyment, lost grant or twenty years' user under the Act, the right acquired was only to be protected from a nuisance arising by deprivation of light. The decision was in effect a compromise between two conflicting policies *viz.*, the protection of the amenities of town-dwellers on the one hand, and on the other, the desire to avoid hampering the growth of towns or injuring the value of urban property.⁷ But the decision was rested on the historical circumstance that an action on the case of nuisance was originally the remedy for the disturbance of the easement of light as of other easements.⁸

31. Cause of action for obstruction of light.—In an action for obstruction of light, the plaintiff must prove not a mere obstruction or diminution of it, but a nuisance to comfortable or beneficial occupation

1. As to the effect of alteration of such windows, see *National Provincial Plate Glass Insurance Co. v. Prudential Insurance Co.*, (1877) 6 Ch. D. 757; as to opening new windows, see *Tabling v. Jones*, (1865) 11 H.L.C. 290; *Andrews v. Waite*, (1907) 2 Ch. 501.

2. *Griffith v. Clay*, (1912) 1 Ch. 291; Indian Easements Act, s. 17 (b).

3. As to implied grant, see *Hers v. Union Bank*, (1861) 2 Giff. 686; *Wheeldon v. Burrows*, (1879) 12 Ch. D. 31; *Broomfield v. Williams*, (1897) 1 Ch. 603; *Pollard v. Gare*, (1901) 1 Ch. 834; *Frederick Betts v. Pickfords*, (1906) 2 Ch. 87; *Browne v. Flower*, (1911) 1 Ch. 219 at 225; for a case of the right being taken away by grant, see *Foster v. Lyons*, (1927) 1 Ch. 219.

4. *Back v. Stacey*, (1826) 2 C. & P. 465; *Kelk v. Pearson*, (1871) L.R. 6 Ch. 809, *per* James, L.J.; *City of London Co. v. Tennant*, (1873) L.R. 9 Ch. 212, *per* Lord Selborne.

5. *Calcraft v. Thompson*, (1867) 15 W.R. 387; *Scott v. Pape*, (1886) 31 Ch. D. 554; *Warren v. Brown*, (1902) 1 K.B. 15.

6. (1904) A.C. 179, reversing (1902) 1 Ch. 302 (C.A.).

7. *Per* Lord Lindley in (1904) A.C. 179 at p. 209.

8. Holdsworth, Vol. VII, p. 339.

of his premises.¹ If the plaintiff has still enough light from other sources, he cannot succeed²; but light from sources which are precarious and in respect of which he has no right cannot be taken into account.³ Where the other source was sky-light which could not have been obstructed except by the dominant owner himself, it will not be disregarded.⁴ As actual user does not increase the right, a person cannot acquire a right to a special quantity of light by user for twenty years to the knowledge of the servient owner.⁵ As actual user does not diminish the right, a person who has often kept his windows closed or used blinds or plate-glass does not lose his right to insist on sufficient light after an obstruction.⁶ Whether the obstruction of light is a nuisance would depend, as in other cases of nuisance, on the locality and other circumstances of the case. Though the standard of a well-lighted room in a crowded city is different from one in the country,⁷ the minimum requirement for ordinary purposes like reading or writing or sewing with ease is fairly absolute.⁸ When that is diminished, a person can complain though he lives in a manufacturing locality where "a well-lighted room on the ground floor is a rare find."⁹ It was observed in a recent English case that the occupant of a ground floor room in a crowded part of the west end of London like Mayfair could not be compelled to give up his ancient lights and use electric light for having his lunch.¹⁰

1. *Per* Lord Lindley, in (1904) A.C. 179 at p. 208; *Semon v. Bradford*, (1922) 2 Ch. 737. Light required for illuminating stained glass windows and mural decorations in a church is within the rule; *A. G. v. Queen Anne Gardens Mansions, Ltd.*, (1888) 5 T. L. R. 430. A person cannot complain of glare or reflected light from the obstructing wall: *Lanfranchi v. MacKensie*, (1867) L. R. 4 Eq. 421; *Rahid Allidina v. Jiwandas Khemji*, 1 L. R. (1942) 1 Cal 483; 1943 Cal 35.

2. *Higgins v. Betts*, (1905) 2 Ch. 210; *per* Lord Lindley, in (1904) A.C. at pp. 210, 211. As to the limit of building on either side of a room with windows on opposite sides, see *Sheffield Masonic Hall Co. v. Sheffield Corporation*, (1932) 2 Ch. 15.

3. *Per* Lord Lindley, in (1904) A.C. at p. 211, see also *Kine v. Jolly*, (1907) A. C. at p. 7; *cf.* *Jadooie v. Kishen*, (1927) 105 L. C. 39 (Pat.).

4. *Smith v. Evangelisation Society*, (1933) 1 Ch. 515.

5. *Ambler v. Gordon*, (1905) 1 K. B. 417. He may, however, get it under grant, express or implied, *Browne v. Flower*, (1911) 1 Ch. 219. He may get compensation for loss of it due to an independent wrong, *eg.*, a public nuisance; *Campbell v. Paddington B. C.*, (1911) 1 K. B. 869, 879.

6. *Turner v. Spooner*, (1861) 1 Dr. & Sm. 467; *Price v. Hilditch*, (1930) 1 Ch. 500. The dominant owner cannot, however, increase the burden on the servient tenement; *Ankerson v. Connelly*, (1907) 1 Ch. 678; *News of the World v. Allen Fairhead & Sons, Ltd.*, (1931) 2 Ch. 402.

7. *Kine v. Jolly*, (1907) A.C. at p. 3; (1905) 1 Ch. at 497, *Clarke v. Clark*, (1865) L.R. 1 Ch. 16; see, however, Page Wood, V. C. in *Dent v. Auction Mart Co.*, (1866) 2 Eq. 236 at 248.

8. *Horton's Estate Ltd. v. James Beattie, Ltd.*, (1927) 1 Ch. 75.

9. *Per* Russel, J. in *Horton's Estate v. Beattie*, (1927) 1 Ch. at p. 78.

10. *Fishenden v. Higgs and Hill Ltd.*, (1935) 153 L.T. 128, 140, *per* Romer, L.J.

32. Right to light in India.—In India the Easements Act substantially adopts the doctrine in force in England.¹ It enacts that an occupier can sue for disturbance of the easement of light only when the disturbance interferes materially with his physical comfort² or prevents him from carrying on his accustomed business as beneficially as he had done before. An owner can sue if the obstruction causes damage by way of affecting the evidence of the easement or materially diminishing the value of the dominant heritage.³ In provinces where the Act is not in force the courts have adopted the decision in *Colls' case*,⁴ as the governing authority.⁵

33. Right to air.—In respect of air, there are two rights to be considered, (a) right to ventilation, or free passage of air, (b) right to purity of air.

34. Right to free passage of air.—Every person has a natural right to the air vertically coming to his property.⁶ He has no natural right to the air coming from adjacent property, for the same reason that he has no such right to light.⁷ But he can acquire an easement⁸ by grant or prescription. He cannot, however, acquire by prescription a right to air passing over his open space or to his premises otherwise than through apertures.⁹ Thus claims to the free passage of air for a windmill,¹⁰ a chimney,¹¹ a structure for storing timber,¹² or to the south breeze¹³ have been disallowed. Obstruction of air flowing at large is not a cause of action

1. Ss. 15, 28, 33.

2. S. 33, Explanation 2; see *Esa Abbas Sait v. Jacob*, (1909) I.L.R. 33 Mad. 327; 20 M.L.J. 291; *Sofia Bibi v. Vasudeva*, (1940) 2 M.L.J. 381; *Durga Prasad v. Lachmi Narain*, (1924) 22 A.L.J. 314; 1924 All. 394; *Suraj Narain v. Kalyan Das*, 1929 All. 430; *Panna v. Ram Saran*, (1933) I.L.R. 55 All. 711; 1933 A.L.J. 1006; *Jadooie v. Kishen*, 1928 Pat. 106; *Framji v. Framji*, (1905) 7 Bom. L.R. 352; *Rhimaji v. Jeshwant*, (1929) 31 Bom. L.R. 771; 1929 Bom. 388; *Mahomed Zaman v. Malik Umar*, I.L.R. 17 Lah. 599; 1936 Lah. 792; *Hukomal v. Tarachand*, 1938 Sind 37; *Abdulla Haroon v. Karachi Municipality*, I.L.R. 1942 Kar. 225.

3. S. 33, Explanation 1.

4. (1904) A.C. 179.

5. *Anath v. Galstaun*, (1908) I.L.R. 35 Cal. 661; 12 C.W.N. 519; *Paul v. Robson*, (1914) I.L.R. 42 Cal. 46 (P.C.); 41 I.A. 180; *Ranomali v. Mokundalal*, (1914) 23 I.C. 959 (Cal.); *Debendra v. Surendra*, (1927) 45 C.L.J. 474; 1927 Cal. 345; *Dwarka v. Dewa Singh*, 1928 Lah. 735; *Sohan v. Jagat*, 1928 Lah. 980; *Balthazar v. Patail*, (1917) 49 I.C. 458 (Bur.); *Hakim v. Earle*, 1931 Lah. 443.

6. Indian Easements Act, s. 7, Illustration (d).

7. *Bryant v. Lefever*, (1879) 4 C.P.D. 172, C.A.; see above, para. 30.

8. *Hall v. Lichfield Brewery*, (1880) 49 L.J. Ch. 655 (implied grant).

9. *Roberts v. Macord*, (1832) 1 M. & R. 230; *Potts v. Smith*, (1868) L.R. 6 Eq. 311; *Harris v. De Pinna*, (1886) 33 Ch. D. 238. See *Bass v. Gregory*, (1890) 25 Q.B.D. 481 (air through a shaft communicating with a disused well).

10. *Webb v. Bird*, (1861) 10 C.B.N.S. 268; (1863) 13 C.B.N.S. 841.

11. *Bryant v. Lefever*, (1879) 4 C.P.D. 172.

12. *Harris v. De Pinna*, (1886) 33 Ch.D. 238.

13. *Barrow v. Archer*, (1863) 2 Hyde 125; *Bagram v. Khettranath*, (1869) 3 B.L.R. O.C.J. at p. 46; *Delhi & London Bank v. Hem Lal Dull*, (1887) I.L.R. 14 Cal. 839.

though it has resulted in damage, *e.g.*, depreciation of the plaintiff's property, nuisance by reason of smells or exhalations in the plaintiff's premises not being carried off by flowing air.¹ The reason of this rule as of that denying a right to an unobstructed prospect or view is that such rights if allowed would impose a burden on large and indefinite areas of property and could be acquired without the servient owners being able to resist or interrupt the user.² Such rights may, however, arise under contract express or implied.³ In England the easement to the flow of air⁴ differs from that to light, because an action for obstruction of air is allowed only on proof of danger to health or something very nearly approaching it.⁵ In India ventilation of houses is of much greater importance than in England. Accordingly the Easements Act departs from the English law by placing the easements to light and air on the same footing and by allowing an action for the disturbance of the latter when it interferes materially with the physical comfort of the plaintiff, though it is not injurious to his health.⁶

35. Right to purity of air.—Every person has a natural right that the air passing to his land shall not be unreasonably polluted by other persons.⁷ The right is not to absolute purity but is, like the right to purity of water, subject to user by others of their property. The rules regarding the degree of pollution that will make it an actionable nuisance will be discussed in connection with the second category of nuisance, *viz.*, injury to the person, property or comfort of the occupier. An easement to pollute air may be acquired by grant⁸ or prescription, subject to two important conditions: (a) that a prescriptive right to pollute can be acquired only if the pollution continued during all the twenty years as a nuisance to the person or persons affected⁹; (b) that the pollution is not a public nuisance under common law or statute.

1. *Chastey v. Ackland*, (1895) 2 Ch. 389.

2. *Dalton v. Angus* (1881) 6 A.C. at p. 24.

3. *Campbell v. Paddington R.C.*, (1911) 1 K.B. 869.

4. On the question whether it is acquired under the common law or under the Prescription Act, see *Feov v. Bird*, above, *Chastey v. Ackland*, (1895) 2 Ch. at p. 402; *Cf. Simpson v. Godm. in Chester*, (1897) A.C. at 709, *Dalton v. Angus*, (1881) 6 A.C. at 798.

5. *City of London Brewery Co. v. Tennant*, (1893) L.R. 9 Ch. App. at p. 221, *per* Lord Selborne, L.C.; see also *Gale v. Abbot*, (1862) 8 Jur. N.S. 987; *Dent v. Auction Co.*, (1866) L.R. 2 Eq. 238; *Hall v. Lichfield Brewery Co.*, (1880) 49 L.J. Ch. 655. Therefore the practice of combining 'light and air' in pleadings and evidence has been condemned, *City of London Brewery Co. v. Tennant*, above, *Bryant v. Lefever*, above, *Baxter v. Bower*, (1875) 44 L.J. Ch. 625.

6. Ss. 15, 28, 33; *Framji v. Framji*, (1905) 7 Bom. L.R. 352, 381; *cf. Modhoooodhun Dey v. Bissonauth Dey*, (1875) 15 B.L.R. 361, 367.

7. Indian Easements Act, s. 7, Illustration (b).

8. See *Pollbach Colliery Co. v. Woodman*, (1915) A.C. 634.

9. *Bliss v. Hall*, (1838) 4 Bing. N.C. 183; *Flight v. Thomas*, (1839) 10 A. & E. 590, *Sturges v. Bridgman*, (1879) 11 Ch. D. 852.

36. Injury to person, property or comfort of the occupier.—We now pass on from disturbances of incorporeal rights in immovable property to the second category of nuisance, above stated. The different injuries may be considered separately.

37. Injury to person.—The liability for nuisance resulting in injury to the person is clear. It is only a particular form of the wrong of causing bodily harm, because such harm may be caused in other modes than a nuisance and is actionable at the instance of other persons than occupiers of property.

38. Injury to property.—Here again the liability for nuisance is only a species of a larger wrong. Injury to property may arise also in other modes, *e.g.*, trespass, waste. A nuisance resulting in such injury may arise by the disturbance of an incorporeal right or easement, *e.g.*, subsidence of land or house by withdrawal of support. It may also arise by improper *user of property* not amounting to disturbance of such rights and is actionable if the damage thereby caused is substantial and not merely trivial. The leading instance is *St. Helen's Smelting Co. v. Tipping*,¹ where damages and injunction were granted against the owner of a copper smelting factory from which noxious fumes escaped and caused trees and shrubs in the plaintiff's property to wither. It was held that it was no excuse that the place was convenient or suitable for the factory, or that other factories in the locality emitted equally noxious fumes, or that the factory was already there and the plaintiff came to the nuisance.² The case of *Rylands v. Fletcher*³ is an instance of injury to property due to a nuisance, *viz.*, flooding of mines by the escape of water from a reservoir. Other instances of such injury are where it is caused by the escape of fire, explosives, animals,⁴ water⁵ or sewage⁶ from the defendant's premises, use of machinery causing structural damage by

1. (1865) 11 H.L.C. 642; 4 B. & S.O. 6; L.R. 1 Ch. 66; see also *Salvin v. North Brancepeth Coal Co.*, (1874) L.R. 9 Ch. 705, 709, 710; for other cases of injury by fumes, see *Unifreville v. Johnson*, (1855) L.R. 10 Ch. 530 (cement works); *Imperial Gas Co. v. Broadbent*, (1856) 7 De M. & G. 436 (gas company); *Saville v. Kilner*, (1872) 26 L.T. 277 (glass works); *Brooke v. Wig*, (1878) 8 Ch. D. 510; *Bigsby v. Dickinson*, (1875) 4 Ch. D. 24; *Shotts Iron Co. v. Inglis*, (1882) 7 A.C. 518 (calcining operations); *West v. Bristol Tramways Co.*, (1908) 2 K.B. 14 (injury by creosote fumes); *Manchester Corporation v. Farnworth*, (1930) A.C. 171 (sulphur fumes from electric generating station).

2 L.R. 1 Ch. 55; see also *Bliss v. Hall*, (1838) 4 Ring N.C. 183, where that was the only plea on demurrer and rejected; see *R. v. Cross*, (1826) 2 C. & P. 483; *Sturges v. Bridgman*, (1879) 11 Ch. D. 852. 3. (1868) L.R. 1 Ex. 280. 4. Below para. 65.

5 *Reynolds v. Clarke*, (1725) 2 Ld. Raym. 1399; *Fay v. Prentice*, (1845) 1 C.B. 828; *Hurdman v. N. E. Ry. Co.*, (1878) L.R. 3 C.P.D. 168. Cf. *Bartlett v. Tottenham*, (1932) 1 Ch. 114; see *Mahadeo v. Sarju*, (1932) 30 A.L.J. 758; 1932 All. 573; *Manumal v. Shamdas*, 1935 Sind. 46.

6 *Tennant v. Goldwin*, (1703) 2 Ld. Raym. 1192; *Hoate v. Dickinson*, (1720) 2 Ld. Raym. 1568; *Snow v. Whithead*, (1864) 27 Ch. D. 558; *Alston v. Grant*, (1874) 3 E. & E. 128; *Broder v. Saillard*, (1876) L.R. 2 Ch. D. 602; *Hargreaves v. Hartopp*, (1905) 1 K.B. 472.

vibrations to adjoining property,¹ overloading the upper floor and causing it to fall down on goods in the lower floor,² allowing a building to be in a dilapidated condition and fall on adjacent property,³ allowing a tree to overhang adjoining land and hamper the growth of plants therein,⁴ or spread its roots causing subsidence of adjoining premises.⁵

39. Injury to comfort.—While liability for injury to person or property may arise in other modes than a nuisance, disturbance of comfort is actionable only as a nuisance. In other words the law protects the right to comfort only as incident to the possession of property. Disturbance of comfort has been recognised as actionable since *Aldred's case*,⁶ where an action was allowed for offensive smells from a hoghouse. But it was formerly more often the subject of a criminal indictment on the ground of its having assumed the proportions of a public nuisance than a civil cause of action. It was since the middle of the last century and after the rise of a large urban population in England that actions for discomfort became common and the rules relating to them were developed in a series of decisions. In an action for a nuisance of this type, the plaintiff must prove substantial discomfort. It is unnecessary to prove any injury to health.⁷ An action will not lie merely on the ground of depreciation of the selling or letting value of the plaintiff's property, *e.g.*, where a boys' school located near residential premises caused their depreciation in value.⁸ But depreciation may, however, be evidence of substantial discomfort.⁹ The bulk of the case-law on this subject relates to disturbance by smell and noise. The obstruction of the easement of light is also regarded as a nuisance of this type and governed by similar principles.¹⁰ Other instances are escape of heat,¹¹ water, dirt,¹² dust,¹³ insects.¹⁴ These are not exhaustive and other

1. *Hoare v. MacAlpine*, (1923) 1 Ch. 167; *Meux's Brewery v. City of London Electric Light Co.*, (1895) 1 Ch. 287; *Shott's Iron Co. v. Inglis*, (1882) 7 A.C. 518.

2. *Edwards v. Halinder*, (1593) Poph. 46.

3. *Taylor v. Stindall*, (1845) 7 Q.B. 634; *Tedd v. Flight*, (1860) 9 C.B.N.S. 374.

4. *Earl of Lonsdale v. Nelson*, (1823) 2 B. & C. 302, 311; *Smith v. Giddy*, (1907) 2 K.B. 448. 5. *Butler v. Standard Telephones*, (1940) 1 K.B. 399. 6. (1610) 9 Co. R. 57(b).

7. *Malton Board of Health v. Malton Manure Co.*, (1879) 4 Ex. D. 302; *Bishop Auckland Local Board v. Bishop Auckland Iron Co.*, (1882) 10 Q.B.D. 138, 141.

8. *Harrison v. Good*, (1871) L.R. 11 Eq. 338.

9. *Tinkler v. Aylesbury Dairy Co.*, (1888) 5 T.L.R. 52; see also *Soltan v. DeHeld*, (1851) 2 Sim. N. S. 133, 158, 159. 10. Above, para. 30.

11. *Reinhardt v. Mentast*, (1889) 42 Ch. 682; *Sanders-Clerk v. Grosvenor Mansions*, (1900) 2 Ch. 373; *Vanderpant v. Mayfair Hotel Co.*, (1930) 1 Ch. 138; as to injury to property by heat, see *Robinson v. Kilvers*, (1889) 41 Ch. D. 88.

12. *Broder v. Saillard*, (1876) 2 Ch. D. 692; *Hurdman v. N. E. Ry. Co.*, (1878) 3 C.P.D. 168; *Snow v. Whitehead*, (1884) 27 Ch. D. 588.

13. *Pollback Colliery Co. v. Woodman*, (1915) A.C. 634.

14. *Bland v. Yates*, (1914) 58 Sol. J. 612 (rats and flies); *O'Gorman v. O'Gorman* (1903) 2 Ir. 573 (bees). For cases of nuisance due to bugs, cockroaches etc., see (1937) 83 L. J. 359.

kinds of nuisance may arise, *e.g.*, picketing during a strike by watching and besetting a house,¹ allowing gypsies to occupy property so as to interfere with the health of the neighbourhood,² allowing persons to occupy and bring caravans on property and commit nuisance and trespass on adjoining property,³ carrying on the business of an undertaker in a residential locality.⁴

40. Instances of discomfort by smell and noise.—The following are some instances of actions allowed for discomfort due to smell and noise :—

Smell, *e.g.*, from a lime kiln,⁵ swine yard,⁶ chandler's works,⁷ soap boiling,⁸ brick-burning,⁹ smelting ore,¹⁰ manure works,¹¹ burning mineral refuse,¹² a shed for cleaning railway engines,¹³ a hotel,¹⁴ fat melting,¹⁵ fried-fish shop,¹⁶ manure heap,¹⁷ sewage farm,¹⁸ manufacture of fish guano and fish oil,¹⁹ storing night soil refuse,²⁰ urinal,²¹ latrine,²² slaughter house,²³ stable yard,²⁴ hackney stand,²⁵ oil mill,²⁶ discharge of offensive liquid into a municipal drain.²⁷

1. *Lyons v. Wilkins*, (1899) 1 Ch. 255.
2. *A. G. v. Stone*, (1895) 12 T.L.R. 76.
3. *A. G. v. Corke*, (1933) 1 Ch. 89.
4. Joyce, Nuisances, p. 174; Ruling Case-law, Vol XX, p. 455; *Densmore v. Evergreen Camp*, (1910) 112 Pac. 255; 31 L. R. A. (N.S.) 608.
5. *Aldred's case*, (1610) 9 Co. Rep. 57 (b).
6. *Aldred's case*, above; *Banbury Sanitary Authority v. Page*, (1881) 8 Q.B.D. 97.
7. *Bliss v. Hall*, (1838) 4 Bing. N.C. 183.
8. *R. v. Pierce*, (1683) 2 Show. 327.
9. *Walter v. Selfe*, (1851) 4 De G. & S. 315; *Bamford v. Turnley*, (1862) 3 B. & S. 62; *Beardmore v. Tredwell*, (1862) 3 Giff. 683; *Cavey v. Ledbetter*, (1863) 13 C.B.N.S. 470.
10. *Crump v. Lambert*, (1867) L.R. 3 Eq. 409.
11. *Knight v. Gardner*, (1869) 19 L.T. 673 *Borough of Malton v. Malton Manure Co.*, (1879) 4 Ex. D. 302.
12. *Fleming v. Hislop*, (1886) 11 A.C. 886, 891.
13. *Smith v. Midland Ry. Co.*, (1877) 37 L.T. 224.
14. *Dore v. Pecorini*, (1887) 31 Sol. J. 726; *Sanders-Clerk v. Grosvenor Mansions Co.*, (1900) 2 Ch. 373 (smell from a stove).
15. *A. G. v. Cole*, (1901) 1 Ch. 205.
16. *Adams v. Ursell*, (1913) 1 Ch. 269; *Pulleyn v. France*, (1913) 57 Sol. J. 173; *Bedford v. Leeds Corporation*, (1913) 77 J.P. 430.
17. *Bland v. Yates*, (1914) 58 Sol. J. 612; *Swaine v. G. N. Ry. Co.*, (1864) 4 De. G. J. & Sm. 211.
18. *Bainbridge v. Chertsey Urban Council*, (1915) 84 L.J. Ch. 626.
19. *A. G. v. Plymouth Fish Guano Co.*, (1912) 76 J.P. 19.
20. *Great Central Ry. Co. v. Doncaster Rural Dt. Council*, (1917) 118 L.T. 19; *Basil v. Calcutta Corporation*, I.L.R. (1942) 2 Cal. 131; 1941 Cal. 207.
21. *Vernon v. Vestry of St. James*, (1860) 16 Ch. D. 449; when erected under statutory authority, see *Biddulph v. Vestry of St. George, Hanover Square*, (1863) 33 L. J. Ch. 411; *Magg v. Bocken*, (1888) 5 T.L.R. 22; *Mudge v. Penge, U.D.C.*, (1916) 80 J. P. 441; *Sellers v. Matlock Bath Local Board*, (1885) 14 Q.B.D. 928; *Dattatraya v. Gopisa*, 1927 Nag. 236; *Jugal Kishore v. Ram Saran*, 1943 Lah. 306.
22. *Krishna Chandra v. Gopal Chandra*, 1938 Lah. 94
23. *Municipal Commissioners of Calcutta v. Mahomed*, (1871) 7 B.L.R. 499, 508.
24. *Rapier v. London Tramways Co.*, (1893) 2 Ch. 588; *Bhai Bhicaji v. Perojshaw*, (1915) I.L.R. 40 Bom. 401; 17 Bom. L.R. 1040; *Ali Mahomed v. Municipal Commissioner, Bombay*, (1925) 27 Bom. L.R. 581; 1925 Bom. 458.
25. *Nirmal Chandra v. Patna Municipality*, I L.R. (1937) 1 Cal. 407; 1936 Cal. 707.
26. *Sadasiva v. Rangappa*, (1918) M.W.N. 293; 45 I C. 428
27. *Galstaun v. Doonia Lal*, (1905) I.L.R. 32 Cal. 697; 9 C.W.N. 612.

Noise and vibration caused by machinery, *e.g.*, iron foundry,¹ pounding of a mortar and pestle in a confectioner's business,² electric power station,³ aeroplane engine,⁴ printing press,⁵ cotton spinning and weaving mill⁶, flour mill,⁷ demolition with the help of pneumatic hammers, and riveting steel frames for building construction.⁸

Noise from other sources, *e.g.*, peal of bells in a Roman Catholic church,⁹ music lessons in a private house,¹⁰ music hall using a powerful band within 100 yards of the plaintiff's house during fetes held twice a week,¹¹ singing and dancing after midnight in a hotel¹², circus or theatre near residential premises,¹³ alteration of part of residential premises into business premises noisy by use of a lift and continual banging of doors,¹⁴ cheering of crowds gathering to see horseraces¹⁵ or regattas¹⁶ or a boxing match in a club,¹⁷ rifle practice,¹⁸ animals in a stable,¹⁹ cockerels in a poultry farm,²⁰ tin cans in a dairy,²¹ performance of ceremonies with loud music and drums at night in a residential area.²²

1. *Crump v. Lambert*, (1867) L. R. 3 Eq. 409; *Ebrahim Pir Md. v. Gangaram*, 1930 Sind 310.

2. *Sturges v. Bridgman*, (1879) 11 Ch. D. 852.

3. *Shelfer v. City of London Electric Lighting Co.*, (1895) 1 Ch. 287; *Colwell v. St. Pancras Borough Council*, (1904) 1 Ch. 707; *Knight v. Isle of Wight Electric Co.*, (1903) 73 L.J. Ch. 299.

4. *Bosworth-Smith v. Gwynnes*, (1920) 89 L.J. Ch. 368.

5. *Rushmer v. Polsue*, (1907) A.C. 121; (1906) 1 Ch. 234.

6. *Land Mortgage Bank v. Ahmedbhai*, (1883) I.L.R. 8 Bom. 35, (nuisance by noise besides the fluff and smoke issuing out of the mill during the monsoon).

7. *Ebrahim Pir Md. v. Gangaram*, 1930 Sind 310; *Thakurdas v. Bhawanji*, 1937 Sind 8; *cf. Behari Lal v. James McLean*, (1924) I.L.R. 46 All. 297.

8. *Andrae v. Selfridge & Co.*, (1936) 2 A.E.R. 1413; (1937) 3 A.E.R. 255; (1938) 1 Ch. 1; *Matania v. National Provincial Bank*, (1936) 2 A.E.R. 633; *Peters v. Wilment*, (1936) 82 L.J. 378.

9. *Soltan v. DeHeld*, (1851) 2 Sim. N. S. 133; *Hardman v. Holberton*, (1866) W. N. 379.

10. *Christie v. Davey*, (1893) 1 Ch. 316; *Motion v. Mills*, (1897) 13 T.L.R. 427.

11. *Walker v. Brewster*, (1876) L.R. 5 Eq. 25.

12. *New Imperial and Windsor Hotel Co. v. Johnson*, (1912) 1 Ir. 327; see also *Spruzen v. Dossett*, (1996) 12 T.L.R. 246; *Vandarpant v. Mayfair Hotel Co.*, (1930) 1 Ch. 138.

13. *Inchbald v. Robinson*, (1869) L.R. 4 Ch. 388; *Winter v. Baker*, (1886) 3 T.L.R. 569; *Barber v. Penley*, (1893) 2 Ch. 447; *Lyons v. Gulliver*, (1914) 1 Ch. 631.

14. *Newman v. Real Estate Debenture Corporation*, (1940) 1 A.E.R. 131.

15. *Dewar v. City and Suburban Race Course Co.*, (1899) 1 Ir. R. 345; *Torry v. Chandler*, (1934) 79 Sol. Jo. 11 (grey-hound racing loudspeaker).

16. *Bostock v. N. Staffordshire Ry. Co.*, (1867) 5 De G. & S. 534.

17. *Bellamy v. Wells*, (1890) 60 L.J. Ch. 156.

18. *Hawley v. Steele*, (1877) 6 Ch. D. 521, where it was authorised by statute.

19. *Ball v. Ray*, (1873) L.R. 8 Ch. 467; *Broder v. Saillard*, (1876) 2 Ch. D. 692; cases in p. 195, note 24.

20. *Leeman v. Montague*, (1936) 2 A.E.R. 1677. In this case the noise was sought to be reproduced in court by gramophone records but their admissibility was not decided.

21. *Tinkler v. Aylesbury Dairy Co.*, (1888) 5 T.L.R. 52; *cf. Fanshaw v. London & Provincial Dairy*, (1887) 4 T.L.R. 694 (where the noise was held not excessive).

22. *Shaikh Irmal v. Nirchinda Venkatanarasimulu*, I. L. R. (1937) Mad. 51; 71 M.L.J. 40.

41. Test of substantial discomfort.—The well-known test is that propounded by Knight-Bruce, V.C. in *Waller v. Selfe*,¹ which was a case of pollution of air by brick-burning, and practically the starting point of the law of actionable discomfort :

“Ought this inconvenience to be considered in fact as more than fanciful, more than one of mere delicacy or fastidiousness, as an inconvenience materially interfering with the ordinary comfort physically of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions among the English people ? ”

In other words the discomfort should be such as an ordinary or average person in the locality and environment would not put up with or tolerate.²

42. Material factors in the question of substantial discomfort.—The following factors are material in deciding whether discomfort is substantial, (a) its degree or intensity, (b) its duration, (c) its locality, (d) the mode of user of the property.

43. Degree or intensity of the discomfort.—It must be such as to inconvenience an ordinary or average person, not a fastidious, weak, nervous or sick person.³ If this test is satisfied, the damage suffered by a nervous or a sick person may be taken into account in estimating the damages. If not, there is no nuisance in law though annoyance or discomfort may subjectively exist. A person may for instance feel a real dislike and annoyance at the proximity of an unsightly building or a shop or a school near him ; a sick person may be upset by the noise of children in the neighbour's house. But these persons can have no relief in a court of law. In *Christie v. Davey*⁴ noise due to the inmates of a house singing music lessons for two to three hours a day was not considered to be excessive ; but it would have been otherwise if the hours were longer or a residential house was converted into a music school for strangers.⁵ The degree of inconvenience is a question of fact depending on standards of comfort varying with times and places. In modern times there has been a considerable extension of the right to comfortable occupation in quiet residential

1. (1851) 4 De G. & S. 315, 322.

2. As to the phrase substantial injury to property, see *St. Helen's Smelting Co. v. Tipping*, (1865) 11 H L.C at p. 650, *per* Lord Westbury ; *Gaunt v. Fyney*, (1872) L.R. 8 Ch. 8, 12, *per* Lord Selborne, L.C.

3. *Lex non favet delicatorem votis*; *Aldred's case*, (1610) 9 Rep. 57(b); *Cawacshak v. Prafulla*, 1941 Nag. 364

4. (1893) 1 Ch. 316 ; for other instances of noise held not substantial, see *Gaunt v. Fyney*, (1872) L.R. 8 Ch. 8 (noise of machinery in a silk mill) ; *Heath v. Mayor of Brighton*, (1908) 98 L. T. 718 (noise from an electric generating station not shown to disturb the services in a church).

5. *Motion v. Mills*, (1896) 13 I.L.R. 427.

surroundings. In some American cases the business of an undertaker in a residential locality has been treated as a nuisance on account of its depressing effects on the minds of the neighbours.¹

44. Duration of the nuisance.—A casual or temporary inconvenience is not a nuisance,² e.g., smell due to clearing cesspools or burning weeds,³ noise due to repairing or building a house.⁴ "It takes more than one puff of smoke to create a nuisance by noxious vapour, and more than one bang of a big drum to create a nuisance by noise."⁵ But even a temporary inconvenience may be so excessive as to be a nuisance. Actions have been allowed for pollution of air by burning bricks on land, for building a house on it,⁶ for noise caused by sinking a well or piles underground.⁷ A circus performance for eight weeks was restrained as the noise and shouting was heard all over the plaintiff's house about a hundred yards off.⁸

45. Locality of the nuisance.—A person living in a city or an industrial area has to put up with discomfort by way of noises and smells from which a rural or residential area is usually free.⁹ In *Sturges v. Bridgman*¹⁰ where the pounding of a big mortar and pestle in a confectioner's premises was held to be a nuisance, Thesiger, J.J., made the well-known observation, "what would be a nuisance in Belgrave Square would not be so in Bermondsey." The disturbance of residential localities by noise

1. Above, p. 195, note 4.

2. *Harrison v. Southwark and Vauxhall Water Co.*, (1891) 2 Ch. 409; see also *A. G. v. Sheffield Gas Consumers' Co.*, (1853) 3 De G. M. & G. 304. Cf. *Harper v. Haden & Sons*, (1933) Ch. 298.

3. *Bamford v. Turnley*, (1860) 3 B. & S. 62 at p. 83, *per* Bramwell, L.J.

4. *Gosnell v. Aerated Bread & Co.*, (1894) 10 T. L. R. 661; *Chastey v. London County Council*, (1898) 62 J. P. 184; *Clark v. Lloyds Bank*, (1910) 103 L. T. 211; *Phelps v. City of London Corporation*, (1916) 2 Ch. 255; cf. *Lingke v. Christ Church Corporation*, (1912) 3 K. B. 595.

5. *Per* Lord Parker, in *Hamerton v. Dysart*, (1916) 1 A. C. 57 at p. 86.

6. *Walter v. Selfe* (1851) 4 De G. & S. 315; *Bamford v. Turnley*, above.

7. *Colwell v. St. Pancras Borough Council*, (1904) 1 Ch. 707; see also *Howland v. Dover Harbour Board*, (1898) 14 T. L. R. 355; *De Keyser's Royal Hotel v. Spicer*, (1914) 30 T. L. R. 257.

8. *Inchbald v. Robinson*, (1869) L. R. 4 Ch. 388; *Germaine v. London Exhibitions Ltd.*, (1896) 75 L. T. 101 (disturbance by reason of an exhibition with band and of a cab-stand for visitors).

9. *Bosworth-Smith v. Gwynnes*, (1920) 89 L. J. Ch. 368; *Colwell v. St. Pancras Borough Council*, (1904) 1 Ch. 707; for noise from a flour mill in a town, see *Behari Lal v. James McLean*, (1924) 1 L. R. 46 All. 297. It has been held that a resident in a crowded Indian town cannot complain of the proximity of his neighbour's latrine; *Municipal Committee of Sangor v. Nilkanth*, (1915) 31 I. C. 62 (Nag.); *Gopal v. Krishnarao*, (1925) 92 I. C. 678 (Nag.); *Valan v. Kadirvel*, (1925) 98 I. C. 633 (Mad.).

10. (1879) 11 Ch. D. 852.

especially at night-time has often been restrained¹ and is viewed with increasing disfavour. In *Andreas v. Selfridge & Co.*,² where the plaintiff, the owner of a hotel, was awarded damages for loss of her business due to her customers leaving the hotel on account of noisy building operations carried on even after night-time, Greene, L.J. in the Court of Appeal expressed himself as follows: "I certainly protest against the idea that, if persons for their own profit and convenience, chose to destroy even one night's rest of their neighbours, they are doing some thing which is excusable. To say that the loss of one or two nights' rest is one of those trivial matters in respect of which the law will take no notice appears to me to be quite a misconception, and if it be a misconception existing in the minds of those who conduct these operations, the sooner it is removed the better." Even in noisy and industrial areas a person is entitled to complain of any new or substantial addition to the usual discomfort of the locality. In *Rushmer v. Polsue and Alfieri, Ltd.*,³ the court found that in an area occupied by the printing trade, the introduction of certain printing machinery by the defendants caused, when worked at night, such a serious disturbance as the plaintiff had not experienced before in his house. "It is no answer to say that the neighbourhood is noisy, and that the defendants' machinery is of first-class character."⁴ But if the noise was only the result of carrying on the trade in the locality devoted to that trade according to the particular and established manner, a person living in that place has no right to expect a better standard of comfort.⁵ The Madras High Court held that the plaintiff who was living in a remote and desolate spot in the precincts of the city and near a sewage farm and a tannery could not complain of the location by the municipal authority of a cremation and burial ground for the use of the residents of that part of the city.⁶

46. Mode of user of the property.—Discomfort caused by a person in the ordinary course of enjoying a house or agricultural land, would not

1. *E.g., New Imperial & Windsor Hotel Co. v. Johnson*, (1912) 1 Ir. R. 327 (dancing and singing in a tea room and hotel); for cases of circus, theatres, etc., see above, para. 40.

2. (1937) 3 A. E. R. 255, at p. 261 : (1938) 1 Ch. 1. See also *Shaik Ismail Sahib v. Venkatanarasimhulu*, 1 L. R. 1937 Mad. 51 : 1936 Mad. 905.

3. (1906) 1 Ch. 234; *Hulas Rai v. Sohan Lal*, 1923 All. 443 (noise from beating of hammers restrained).

4. (1906) 1 Ch. 234 at p. 250, *per* Cozens-Hardy, L.J.; see also *per* Lord Loreburn in *Pwllybach Colliery Co. v. Woodman*, (1915) A.C. 634, 633.

5. *Per* Vaughan-Williams, L.J., in (1906) 1 Ch. 234 at p. 247; see also *per* Lord Selborne, L.C., in *Gaunt v. Fynney*, (1872) L.R. 8 Ch. 8 at p. 12.

6. *Muhammad Mohidin Sait v. Madras Corporation*, (1901) I.L.R. 25 Mad. 118; cf. *Rangoon Municipal Committee v. Burma Railways Co.*, (1920) 59 I.C. 823; *Suratee Bara Basar Co. v. Corporation of Rangoon*, (1927) I.L.R. 5 Rang. 722. Much less can he complain if in such a place the sewage farm or other nuisance existed before he took up residence; see *per* Abbot, C.J., in *R. v. Cross*, (1826) 2 C. & P. 434.

usually be so great as to be an actionable nuisance, *e.g.*, burning weeds, clearing cesspools, repairing or pulling down buildings, noise of children or of a piano in a residential house. These disturbances are usually tolerated on the principle of 'give and take, live and let live.'¹ But if they are caused negligently or maliciously they may be a nuisance. In *Moy v. Stoop*² the court held that the crying of children in a nursery was only occasional and could not be complained of by a neighbour, and also observed that if it was not occasional and was due to the negligence of the nurses, the result would have been different. In *Christie v. Davey*³ the defendant was restrained from making noises on the furniture and crockery in his house, with a view to annoy the plaintiffs as a measure of retaliation for not stopping their music which he said was a source of discomfort to him. Formerly the view was held that the fact that a place was suitable or convenient for a certain trade or mode of user was decisive on the question of reasonableness; and it was held accordingly in *Hole v. Barlow*⁴ that to burn bricks on land for building a house on it was not actionable. In *Bamford v. Turnley*,⁵ a similar case, this view was overruled, and it was held that the convenience or fitness of the locality was not a conclusive test. Though not conclusive it may be a material element in the decision of the question.⁶ The phrases 'ordinary' and 'natural user,' and their antitheses are often used in this context, but are vague and cannot be regarded as reliable guides. To have a stable is not an extraordinary mode of user of property and cannot usually be complained of by a neighbour,⁷ but when the ground floor of residential premises was converted into a stable an action was allowed.⁸ A hotel newly started in a residential locality was held a nuisance by reason of the noise of servants in the kitchen⁹ or the heat generated by a large cooking range.¹⁰ To bring or use manure on a farm is a natural user of land but was held an actionable nuisance as the manure was stored in such large quantities as to breed flies.¹¹ Building or demolishing operations are ordinary user of land and continue to be so though modern methods and machinery are adopted for the purpose, *e.g.*,

1. *Bamford v. Turnley*, (1862) 3 B. & S. 62 at p. 84, *per* Bramwell, L.J.

2. (1909) 25 T.L.R. 262.

3. (1893) 1 Ch. 316; *cf.* *Jawand Singh v. Muhammad*, (1919) I.L.R. 1 Lah. 140 (Hindus disturbing Muhammadan prayers by blowing of conches). See also above, para. 26.

4. (1858) 4 C.B.N.S. 334.

5. (1860) 3 B. & S. 62.

6. See *per* Lord Parker in *Hammerton v. Dysart*, (1916) 1 A.C. 57 at p. 86.

7. *Broder v. Suillard*, (1876) 2 Ch. D. 692, 701.

8. *Ball v. Ray*, (1873) L.R. 8 Ch. 467.

9. *Vanderpant v. Mayfair*, (1930) 1 Ch. 138.

10. *Reinhardt v. Mentasti*, (1889) 42 Ch. D. 685; *Sanders-Clerk v. Grosvenor Mansions*, (1900) 2 Ch. 373.

11. *Bland v. Yates*, (1914) 58 Sol. J. 612; *cf.* *Stearn v. Prentice*, (1919) 1 K. B. 394 (rats bred by bone manure used by the defendant; not an actionable nuisance as the bones were not used in excessive quantities).

excavation of foundations to great depths, erecting steel framework and rivetting the frames, using pneumatic hammers for demolition.¹ "The rule as to ordinary user does not mean that the methods of using land and building on it are in some way to be stabilised for ever. As time goes on, inventions and new methods enable land to be more profitably used, either by digging down into the earth or by mounting up into the skies."² These operations would, however, require special care to avoid disturbance and discomfort to others. An occupier may be liable for a private or a public nuisance even by mere inaction, *e.g.*, by allowing a natural pond to stagnate or stink. An occupier of land may not be bound to remove thistles on his land periodically so as to prevent their being carried by the wind to adjoining land and seeding there.³ But a harbour authority was required to abate a nuisance arising from seaweed brought in by the tide.⁴ Therefore whether a nuisance arises from things naturally on the land, or from natural or ordinary user of it is not a rigid test.⁵ Where, however, the user is clearly improper or extraordinary, it would be a nuisance, *e.g.*, carrying on a trade producing offensive noises or smells, holding of public entertainments in residential localities.⁶

47. Meaning of nuisance in special contexts.—Where there is a clause in a contract⁷ or a statute⁸ against the commission of a nuisance, the word will be interpreted as under the general law and in accordance with the above test. When a lessee was under a covenant not to do or suffer anything to be done which was a nuisance, it was held that the word had no more than its strictly legal significance and the establishment of a boys' school was not a nuisance even though it might cause damage by depreciation of the property.⁹ But this principle would yield to any contrary indication in the context. Thus where there was a covenant not to do any act which may be a nuisance or annoyance of the vendor or lessor or adjoining occupiers, it was held that these words were wider than a nuisance

1. *Andreas v. Selfridge & Co.*, (1937) 3 A.E.R. 255; (1938) 1 Ch. 1; see also *Mataina v. National Provincial Bank*, (1936) 2 A. E. R. 1413.

2. (1937) 3 A. E. R. 255 at p. 264, *per* Greene, L.J.

3. *Giles v. Walker*, (1890) 24 Q.B.D. 656.

4. *Proprietors of Margate Pier and Harbour v. Town Council of Margate*, (1869) 20 L. T. N. S. 564.

5. A. L. Goodhart, *Essays in Jurisprudence and the Common Law*, p. 151.

6. *R. v. Moore*, (1832) 3 B. & Ad. 184 (pigeon-shooting leading to crowds causing great noise and disturbance to neighbours); see also *R. v. Carlile*, (1834) 6 C. & P. 636 (exhibiting effigies in windows which attracted crowds); above, paras. 40 and 45.

7. *Harrison v. Good*, (1871) L. R. 11 Eq. 338; *Wood v. Cooper*, (1894) 3 Ch. 671.

8. *E.g.*, Increase of Rent Restriction Acts, 1920-5; see also *Bette v. Penge U. D. C.*, (1942) 2 K. B. 154 under the Public Health Act, 1936, s. 92; above, Chap. IV, para. 47; as to this case see 58 L. Q. R. 443; *Khagendra v. Bhupendra*, (1910) 1 L.R. 38 Cal. 296

9. *Harrison v. Good*, above.

under the law and that it was a breach of the covenant to have a girls' school¹ or a hospital for throat diseases.²

48. Points to be proved in an action for nuisance.—The plaintiff has to prove: (a) that he has some interest in the property to the enjoyment of which he complains of a nuisance, and (b) that there has been a violation by the defendant or his agent or servant or some other person for whose conduct he is vicariously responsible, of one of the rights already discussed. He need not prove any damage resulting to him from the nuisance, or intent or negligence on the part of the defendant, except in so far as these ingredients are involved in the violation of the particular right in question.³ The following points may be considered: (a) the persons who can sue by reason of their interest in property, (b) proof of damage, (c) damage without violation of a right, (d) the persons who can be sued, and (e) nature of liability for nuisance.

49. Persons who can sue for nuisance.—The rights of the following persons may be considered: (a) an occupier of property, (b) a person having an incorporeal right in it, (c) a licensee, (d) a reversioner.

50. Occupier's right to sue.—The right to sue is ordinarily in the person in possession of the property affected by the nuisance.⁴ He may be the full owner or only a holder of a subordinate interest like a lessee or even a weekly tenant.⁵

51. Right of suit by a person having an incorporeal right.—A person having an incorporeal right in property like an easement may sue for a disturbance of it, e.g., obstruction of a right of way, injury to a right of fishery due to pollution of a stream.

52. Licensee's right to sue.—A mere licensee cannot sue for a nuisance.⁶ He may however sue for any injury to his person or property caused by a nuisance if he can establish negligence or other independent

1. *Kemp v. Sober*, (1851) 1 Sim. N. S. 517: see also *Doe v. Keeling*, (1813) 1 M. & S. 95.

2. *Tod-Heatly v. Benham*, (1888) 40 Ch. D. 80; see also *Jones v. Thorne*, (1823) 1 B. & C. 715 (a public house); *Bramwell v. Lacy*, (1879) 10 Ch. D. 691 (hospital); *Rolls v. Miller*, (1884) 27 Ch. 71 (a charity house for poor working girls); *German v. Chapman*, (1887) 7 Ch. D. 271; *Hobson v. Tullock*, (1898) 1 Ch. 424 (boarding house for students); *Wauton v. Coppard*, (1899) 1 Ch. 92 (public house); *Lyttleton Times Co. v. Warners, Ltd.*, (1907) A.C. 476 (no action in respect of noise by printing in a portion of the house allowed by the covenant).

3. Below, para. 62.

4. *Nicolls v. Ely Beet Sugar Factory*, (1931) 2 Ch. 84 (plea of *jus tertii* not available).

5. *Jones v. Chappell*, (1875) L. R. 20 Eq. 539.

6. *Hill v. Tupper*, (1863) 2 H. & C. 121; *Cattle v. Stockton Water-works Co.*, (1875) L. R. 10 Q. B. 453, 457; *Malone v. Laskey*, (1907) 2 K. B. 141; see above, Chap. IV, para. 5; above, p. 179, note 3. See, however, Pollock, Torts, p. 341.

cause of action. Thus in *Ounard v. Antifyre, Ltd.*,¹ it was held that the wife of the occupier of a flat in a building of which the main roof was in the control of the defendants could recover for their neglect to repair the roof which resulted in a heavy piece of guttering from the roof falling on the glass roof of the plaintiff's flat and her being injured by the broken glass. In *Malone v. Laskey*² the defendants had machinery in their premises and had also let adjoining premises in which the sub-tenant in occupation was a company whose manager was living there with his wife. The vibrations from the machinery caused a water-tank in the latter premises to become insecure and fall on the wife of the manager. It was held that her claim for nuisance failed, because, first, she was only a licensee of the sub-tenant and had no interest in the property, and secondly, the defendants were landlords not in actual occupation or control of the premises. Her claim for personal injury due to negligence was also disallowed though it was found as a fact that the fall of the water-tank was due to the vibrations and the defendants' servants had also been guilty of negligence in fixing the bracket of the water-tank. This part of the decision was based on the ground that there was no contractual relation between her and the defendants, and is no longer law after *Donoghue v. Stevenson*,³ discussed later. The decision is also open to the criticism that the defendants should have been held liable for the use of machinery in their premises so as to cause danger of bodily harm to persons lawfully in adjoining premises. This is in substance not a liability for nuisance but one for negligence as in *Ounard v. Antifyre, Ltd.*⁴

53. Reversioner's right to sue.—A reversioner not in possession of property, e.g., a landlord, cannot sue for disturbance of natural rights, unless there is some injury of a permanent nature to the property.⁵ In the case of discomfort by noise, smell or pollution of air caused by a factory, it is the occupier that can sue and not the landlord.⁶ In such a case the nuisance is not permanent because it ceases of itself unless there be

1. (1933) 1 K. B. 551; see below, Chap. XIV, para. 35.

2. (1907) 2 K. B. 141.

3. (1932) A. C. 562; below, Chap. XIV, paras. 57 & 60.

4. (1933) 1 K. B. 551. It may also by reason of the vibrations fall under the *Rylands v. Fletcher* rule, below, para. 65.

5. *Rust v. Victoria Graving Dock*, (1837) 36 Ch. D. p. 130, per Cotton, L. J.; e.g., damage by flood: *Bell v. Twentymian*, (1841) 1 Q. B. 766; *Taylor v. Stendall*, (1845) 7 Q. B. 634; discharging water from eaves: *Tucker v. Newman*, (1839) 11 A. & E. 40; *Fay v. Prentice*, (1845) 1 C. B. 828; structural damage by vibrations: *Shelfer v. City of London Electric Co.*, (1895) 1 Ch. 287; *Colwell v. St. Pancras Borough Council*, (1904) 1 Ch. 707; pollution of a stream: *Jones v. Llunrust-Urban Council*, (1911) 1 Ch. 393; cutting off land: *Alston v. Scales*, (1832) 9 Bing. 3.

6. *Simpson v. Savage*, (1856) 1 C. B. N. S. 347, *Mumford v. Oxford & Worcester Ry.*, (1856) 1 H. & N. 34; *Jones v. Chappel*, (1875) L. R. 20 Eq. 539; *Mott v. Schoolbred*, (1875) L. R. 20 Eq. 22; *White v. London General Omnibus Co.*, (1914) 58 Sol. J. 339; *Land Mortgage Bank of India v. Ahmedbhoy*, (1883) 1 L. R. 8 Bom. 35; *Alwar Chetty v. Madras Electric Supply Corporation*, (1932) 1 L. R. 56 Mad. 289; 63 M. L. J. 868.

some one to continue it.¹ Besides, the reversioner has really no grievance, not a present one, because he is not in possession, nor a potential one, because he has a right to resist the nuisance within three years after his estate falls into possession and thereby prevent an acquisition of an easement to continue the nuisance.² He cannot sue merely on the ground of depreciation of the selling or letting value of his property, as it could be averted by the person in possession suing and stopping the nuisance.³ A reversioner can however sue for a nuisance consisting in any disturbance of an easement which is likely to injure him by affecting the evidence of the easement or by materially diminishing the value of his property,⁴ e.g., a permanent obstruction of his ancient lights⁵, his way,⁶ or his water-supply.⁷

54. Proof of damage in an action for nuisance.—In certain cases of nuisance the right violated may be an easement or a right of user of property, e.g., a right of way, a right to the flow or purity of water in a natural stream. In such cases the plaintiff need not prove actual damage. In *Nicholls v. Ely Beet Sugar Factory, Ltd.*,⁸ a case of injury to a several fishery by pollution, it was held that an action for disturbance of an incorporeal hereditament like an easement or *profit a prendre* would lie without proof of damage. One reason for it is that such disturbance if acquiesced in would furnish evidence in derogation of the right and in time extinguish it. Lord Wright, however, observed that the right to sue without proof of damage depends on the wider principle recognised in *Ashby v. White*,⁹ that an injury to a legal right imports damage. In India the Easements Act¹⁰ enacts a slightly different rule. An action for disturbance of an easement lies only on proof of substantial damage, but the doing of any act affecting the evidence of the easement or materially diminishing the value of the dominant heritage is substantial damage for this purpose. In spite of this difference in the mode of stating the rule, it may not in actual application lead to divergent results in the two countries. But there are other cases of nuisance where the legal right is itself only to protection from some

1. *Jones v. Llanrwst*, (1911) 1 Ch. at p. 404.

2. Indian Easements Act, s. 16. As to acquisition of easement of light against reversioner, see *Simper v. Foley*, (1862) 2 J. & H. 564; *Morgan v. Fear*, (1907) A.C. 425. See *Koyyammu v. Kuttianmoo*, (1918) I.L.R. 42 Mad. 567; 37 M.L.J. 28.

3. *Battishill v. Reed*, (1856) 18 C.B. 696; *Jones v. Chappell*, (1875) L.R. 20 Eq. 539; *Rust v. Victoria Graving Dock Co.*, (1887) 36 Ch. D. 113.

4. Indian Easements Act, s. 33.

5. *Metropolitan Association v. Petch*, (1858) 5 C.B.N.S. 504; cf., *Cooper v. Crabtree*, (1882) 20 Ch. D. 589 (no injury to reversion by erection of temporary hoarding).

6. *Kidgill v. Moor*, (1850) 9 C.B. 364; cf. *Hopwood v. Schofield*, (1837) 2 Moo. & R. 34, (obstruction of way not affecting reversionary right.)

7. *Venkayya v. Raja Vijaya*, (1942) 1 M.L.J. 116; 1942 Mad. 352.

8. (1936) Ch. 343.

9. Above, Chap. I, para. 12.

10. S. 33.

form of damage, *e.g.*, right to comfort, light or support. In England and in India the plaintiff in such cases should prove the particular damage required for the cause of action.

55. Damage without violation of a right.—If the plaintiff fails to prove a violation of one of the rights discussed above or a breach of the correlative duty of the defendant, he has no right to sue merely on the ground that he has sustained damage.¹ For instance, a person whose cattle escaped into the defendant's premises and were injured thereby could not complain of the injury being due to want of a fence or of a fence in good condition in the defendant's land, unless the defendant was under contract, statute or prescription to maintain a fence.² In *Robinson v. Kilvert*³ the plaintiff complained that a stock of brown paper which he had stored in the upper floor of a house was dried up by the heat generated in the defendant's cellar. The heat was not more than 80 degrees and was not felt as uncomfortable in any part of the upper floor. It was held that the defendant was not liable as he had not committed any nuisance and the injury was due to the inherent quality of the paper. If, however, the heat was excessive, the result would have been otherwise. In *Cooke v. Forbes*⁴ the defendant was restrained from sending sulphuretted hydrogen fumes which discoloured the chloride of tin which the plaintiff, a maker of cocoanut matting, used in his bleaching liquid. Here the defendant sent out noxious fumes and could not be heard to say that the injury to the matting was due to the peculiar substance used. Similarly a person who causes noise or other discomfort not in excess of the standard prevalent in the locality does not commit a breach of duty towards a person who sustains injury by his illness being made worse, or by his property being depreciated. But if the noise is excessive, then there would be liability for such damage. So also a person who causes vibrations from noisy machinery will be liable for damage done even to old and weak structures near it.⁵

56. Persons who can be sued.—The liability of the following persons has to be considered: (a) the person who causes the nuisance, (b) the occupier, (c) the landlord and (d) the vendor of the property on which the nuisance exists.

57. Liability of the author of the nuisance.—The person who causes the nuisance is liable whether he is the occupier of the property on

1. Above, para. 2.

2. For cases, see above, Chap. IV, p. 95, note 1. It is only the adjoining occupier that can sue and not a passenger in a railway train who was hurt by a breach of this duty; *Buxton v. N. E. Ry. Co.*, (1869) L.R. 3 Q.B. 549; see also *Roberts v. G. W. Ry. Co.*, (1858) 4 C.B.N. S. 506; *Marfell v. S. Wales Ry. Co.*, (1860) 8 C.B.N.S. 525.

3. (1889) 41 Ch. D. 88.

4. (1867) L. R. 5 Eq. 166

5. *Hoare v. McAlpine*, (1923) 1 Ch. 167.

which it arises, a licensee,¹ or even a stranger like a contractor who builds a wall which obstructs another's way or ancient lights.² It is no defence that he is not in occupation, or that he has no power to abate the nuisance, because he ought not to have created it.³

58. Liability of the occupier.—When a nuisance exists on property and damage arises thereby, it is the person in possession that is primarily liable. He may become liable in the following ways :—

(a) By creating a nuisance by his own positive act or misfeasance or that of his agents or servants. He will also be liable for the acts or defaults of his contractors or licensees.⁴

(b) By allowing a nuisance to arise by a non-feasance, *e.g.*, failure to repair on the part of himself, his agents, servants or contractors. He would be liable even though he was only a tenant and his lessor had covenanted to repair.⁵

(c) By continuing a nuisance which arose before he came into possession. He may be a purchaser or a tenant but is bound to keep the property in good condition and remove any existing nuisance.⁶ Otherwise he is liable for taking a property with a nuisance and continuing it.⁷ The action will lie also against the vendor who originally created the nuisance. The default of the purchaser in continuing the nuisance must be either wilful or negligent. If he could not have discovered the nuisance with due care, or had not time enough to abate it, he may not be liable.⁸ He will be liable only if a nuisance existed when his possession began. Thus an occupier of mines and minerals of adjoining land was held not liable for subsidence resulting from an excavation made by the previous owner, as there was no nuisance by the mere excavation till damage resulted from it.⁹

1. *Whaley v. Laing*, (1857) 2 H. & N. 476; *White v. Jameson*, (1874) L.R. 18 Eq. 303.

2. *Thompson v. Gibson*, (1841) 7 M. & W. 456. See *Watson v. Sutton Water Co.* (1940) 3 A.E.R. 502 C.A. (water co. held liable for flooding of house due to some person turning the tap on after they had agreed to cut off water-supply).

3. *Thompson v. Gibson*, above; see also *Roswell v. Prior*, (1702) 12 Mod. 635.

4. *Laugher v. Pointer*, (1826) 5 B. & C. 547, 560, *per* Littledale, J.; *White v. Jameson*, (1874) L.R. 18 Eq. 303 (brick-burning by licensee).

5. *Wilchick v. Marks*, (1934) 2 K. B. 56. The observation in *Payne v. Rogers*, (1794) 2 H. Bl. 350 that the landlord alone would be liable has never been acted upon.

6. *Humphries v. Cousins*, (1876) 2 C.P.D. 239; *Broder v. Saillard*, (1876) 2 Ch. D. 692.

7. *Penruddock's case*, (1597) 5 Rep. 100 (b); see also *R. v. Pedley*, (1834) 1 A. & E. 822.

8. *Wilkins v. Leighton*, (1932) 2 Ch. 106. In *Penruddock's case* it was observed that the purchaser would be liable only after a request is made to him to abate the nuisance. If however the nuisance was imminently dangerous to the public, a prior request is unnecessary; *A. G. v. Roe*, (1915) 1 Ch. 235; see also *Coupland v. Hardingham*, (1813) 3 Camp. 398.

9. *Hall v. Duke of Norfolk*, (1900) 2 Ch. 493. Cf. *A. G. v. Roe*, (1915) 1 Ch. 235; see above, para. 14.

(d) By allowing a nuisance to arise by the act of a stranger or by natural causes, and allowing it to continue on the premises in his possession.¹ Here again, the conduct of the occupier must amount to a wilful or negligent breach of duty. He is clearly liable if he gave another authority, express or implied, to create the nuisance or took the benefit of it.² He may also be liable for negligence in not abating a nuisance caused by another without his leave or against his will. The degree of care will depend on the gravity of the danger and other circumstances. In *Sedleigh-Denfield v. O'Callaghan*³ the House of Lords had occasion to review the cases and give guidance on this part of the subject. It ruled that a person is liable for continuing a nuisance created on his land by a trespasser if he knew or ought to have known about it. In this respect there is no distinction between a private and a public nuisance resulting from such continuance. The facts were these. On the defendants' land there was a ditch in which at a later date a pipe or culvert for carrying off rain water was placed without their knowledge or consent by a third party. But the defendants subsequently became aware of the pipe and in fact used it for draining off their fields. By some mistake in placing the grating at the opening of the pipe it got choked with leaves and during a heavy rain-storm, water overflowed on the plaintiff's premises. The defendants were held liable for continuing a nuisance, *viz.*, the unguarded pipe. They could not be heard to say that it arose by the act of a trespasser. The liability was for a private nuisance and not under the special one under the rule in *Rylands v. Fletcher* as there was no special use of the property attracting that rule. In *Wringe v. Cohen*⁴ the Court of Appeal held that where the defendant, occupier or owner having control of the premises, had neglected to repair and a danger arose from such neglect, a neighbour injured thereby need not prove that the defendant knew or ought to have known of the danger. On such facts the case would fall within the second category above. Here again there is no distinction between a public and private nuisance and this principle of liability will apply whether the danger was one to adjoining property or to a highway.⁵ But it is necessary to prove knowledge or presumed knowledge of a

1. *A. G. v. Tod-Heatley*, (1897) 1 Ch. 560; *A. G. v. Roe*, (1915) 1 Ch. 235; see also *Proprietors of Margate Pier and Harbour v. Town Council of Margate*, (1869) 20 L. T. N. S. 564; *A. G. v. Corke*, (1933) 1 Ch. 89; above, para. 39; see also *Chibnall v. Paul*, (1881) 29 W. R. 536.

2. *Saxby v. Manchester & Sheffield Ry. Co.*, (1869) L. R. 4 C. P. 193, 203, *per* Bovill, C. J.

3. (1940) A. C. 880. The earlier cases in *Saxby v. Manchester & Sheffield Ry. Co.*, (1869) L. R. 4 C. P. 198 and *Job Edwards v. Birmingham Navigation Ltd.*, (1924) 1 K. B. 341 must be regarded as decisions on the particular facts and dicta in them to the contrary are no longer law.

4. (1940) 1 K. B. 222.

5. (1940) A. C. at pp. 899, 909, 910.

defect or danger which arose by the act of a stranger or by a latent defect.¹

59. Liability of the landlord.—When a tenant is in possession, it is he that is primarily liable for a nuisance. But the landlord may also become liable in certain cases. His liability may be considered in respect of, *first*, nuisances existing on the property at the time of the lease and *second*, those which arise on it afterwards and during the tenancy.

(i) *Nuisance existing at the time of lease.*—The landlord would be liable (a) if by an active misfeasance he had created a nuisance, *e.g.*, building a wall which obstructed the light of the neighbour,² (b) if a nuisance arose by non-feasance. In *Todd v. Flight*,³ the defendant had at the time of letting his premises allowed the chimney to be in such dilapidated condition that it fell on adjoining property of the plaintiff. He was held liable. To this rule of liability there is an exception, *viz.*, that the landlord is not liable if he provides by means of the lease for the removal of the nuisance and obtains a covenant from the tenant to repair.⁴ In such a case, the tenant alone is liable for any injury which happens during the lease. If, however, the landlord had covenanted to repair, he would be liable. In either case the tenant also would be liable for allowing a nuisance to continue during his possession.⁵

(ii) *Nuisance that arose after the lease.*—The landlord is not, but the tenant alone, is liable.⁶ The landlord may however be liable in certain cases. (a) He would be liable if he creates a nuisance by any wilful or negligent act done on the premises in the possession of the tenant, *e.g.*, by negligently executing repairs undertaken by him. Indeed any stranger who does so would be equally liable. (b) It has been suggested that if the landlord is, under a covenant with the tenant, bound to repair and a nuisance arises during the tenancy by his default,⁷ he should be held liable in order to avoid circuity of action. Apart from the question of convenience the landlord would appear to be liable for a breach of duty independent of

1. *Cushing v. Peter Walker & Son*, (1941) 2 A. E. R. 693 ; above, para. 13.

2. *Roswell v. Prior*, (1702) 12 Mod. 635.

3. (1860) 9 C. B. N. S. 377 ; see also *Chauntler v. Robinson*, (1849) 4 Ex. 163 ; *St. Anne's Well Brewery Co. v. Roberts*, (1928) 44 T. L. R. 703 ; *Wilchick v. Marks*, (1934) 2 K. B. 297.

4. *Pretty v. Bicknore*, (1873) L.R. 8 C.P. 401 ; *Gwinnell v. Eamer*, (1875) L.R. 10 C.P. 658 ; *Nelson v. Liverpool Brewery Co.*, (1877) 2 C.P.D. 311. In the U.S.A. the lessor continues to be liable in such a case though he may be liable to recover the damages he paid from the lessee; Restatement II, S. 379, comment (d).

5. *Bröder v. Saillard*, (1876) 2 Ch. D. 692 ; see also *Coupland v. Hardingham*, (1813) 3 Camp. 398.

6. *Cheetham v. Hampson*, (1791) 4 T.R. 318 ; *Russell v. Shenton*, (1842) 3 Q.B. 449 ; *Gandy v. Jubber*, (1864) 5 B. & S. 78, 485 ; *Nelson v. Liverpool Brewery Co.*, (1877) 2 C.P.D. 311.

7. *Payne v. Rogers*, (1794) 2 H. Bl. 350.

contract to take due care to avoid harm to the adjoining occupier. The duty arises from the fact that the contract gives him the ability to make the repairs and control over them.¹ (c) Lastly, he would be liable when he has let premises to a tenant authorising him expressly or impliedly to cause a nuisance. Whether he has so authorised is a question of fact in each case. A person who let a field for the express purpose of getting limestone and being worked as a limekiln was held liable for the nuisance caused by the smoke and blasting operations.² A person who, with knowledge of the way in which his tenant uses the property, adopts it or renews his lease is equally liable.³ But a landlord is not liable if the nuisance is due only to the tenant's faulty mode of user, *e.g.*, failure to clean a sewer. In *Rich v. Basterfield*,⁴ it was held that a landlord was not liable for smoke issuing from the chimney as the chimney by itself was not a nuisance. A landlord cannot be sued on the ground that with notice of the existence of a nuisance caused by the tenant, he has not determined the tenancy.⁵

60. Liability of the vendor.—The vendor or other transferor of immovable property is not ordinarily liable for a nuisance after the transfer. He may however be liable like the lessor, if he had created it by active misconduct,⁶ *e.g.*, erecting a structure to obstruct light. The buyer is bound to exercise due care to ascertain and remove existing nuisances and is liable for injury due to them.

61. Nature of liability for nuisance.—The liability of the above persons for nuisance arises on proof of their violation of one of the rights above discussed. The plaintiff need not prove intent or negligence of the defendant as a separate ingredient in the cause of action. Nor is the want of intent or negligence by itself a defence.⁷ The defendant would be liable for the fault of his servant, independent contractor⁸ or even a stranger,⁹ if

1. Restatement II, § 378, Comment (d). See *Wilchick v. Marks*, (1934) 2 K.B. 56; above, para. 1; *cf.* Chap. XIV, para. 34. By reason of Landlord and Tenant (War Damage) Act, 1939, 2 & 3 Geo. 6 c. 72 obligation to repair does not entail liability for war damage.

2. *Harris v. James*, (1876) 45 L.J.Q.B. 545.

3. *Winter v. Baker*, 37 T. L. R. 568; see also *Gandy v. Jubber*, (1864) 5 B. & S. 78, 435 (the decision of the Exchequer Chamber non-suiting the plaintiff went on a defect of pleading); *Newman v. Real Estate Debenture Corporation*, (1940) 1 A.E.R. 131.

4. (1847) 4 C.B. 783.

5. *Bowen v. Anderson*, (1894) 1 Q.B. 164. The tenancy may be a weekly tenancy. See also *Wilchick v. Marks*, (1934) 2 K.B. 56, 65.

6. There are no reported cases on the point in England, but there are in America; Bohlen, *Studies*, p. 82.

7. *Browne v. Robins*, (1859) 4 H. & N. p. 193, *per* Martin, B; *cf.* *Humphries v. Brogden*, (1850) 12 Q. B. D. at p. 757, *Haines v. Roberts*, (1857) 7 E. & B. 625; *Hunt v. Peake*, (1860) 29 L.J. Ch. p. 797.

8. *Honeywill & Stein v. Larkin*, (1934) 1 K.B. 191; *Matania v. Nat. Prov. Bank*, (1936) 2 A.E.R. 633; *Andreae v. Selfridge & Co.*, (1938) 1 Ch. 1; above, para. 45.

9. Above, para. 58.

there was a breach of duty on his part to prevent a nuisance arising or continuing. But the liability for nuisance is not to be regarded as absolute or independent of negligence,¹ except in certain special cases under the common law or statute.² Barring such cases, the liability usually springs from some element of wilful or negligent wrongdoing.³ In fact these ingredients are often material to determine whether there is a nuisance at all. For instance in an action for discomfort caused by the use of noisy machinery or by building operations, it is no defence that the defendant used the best pattern of steam-hammer or the latest mechanical device, but, as we have seen already, his conduct in wilfully or negligently causing excessive discomfort is an important consideration.⁴

62. Distinction between actions for nuisance and negligence.—Though in many cases a nuisance may involve an element of negligence the causes of action for nuisance and negligence differ.⁵ (a) In the former action the plaintiff need not, but in the latter he must, prove negligence or a breach of duty of care. (b) A nuisance may be caused intentionally while negligence negatives intent. (c) In the former the plaintiff must prove some injury to his enjoyment of property and his own interest in that property; in the latter there is no such requirement. (d) In the former the plaintiff need not prove damage except where the right in question depends on it; in the latter damage is always essential.

63. Instances of absolute liability.—We have had an instance already, *viz.*, injury to the right of support of land from adjacent or subjacent land. The rule in *Rylands v. Fletcher*,⁶ is another instance and occupies a large and important place in the law of nuisance. It may conveniently be considered here, though it has also a wider operation as a rule of liability for injuries which are not nuisances. The subject of statutory liability is considered in a later chapter.

64. The rule in *Rylands v. Fletcher*.—The facts of this case were these. The defendants, owners of a mill, constructed by arrangement with the owner of certain land a reservoir on it for their mill. The plaintiff had a colliery in the locality and there were two other owners of lands between

1. *Sedleigh-Denfield v. O'Callaghan*, (1940) A.C. at pp. 897, 904; *Ilford Urban District Council v. Beal*, (1925) 1 K. B. 672; *Wilkins v. Leighton*, (1932) 2 Ch. 106; above, para. 14.

2. *E.g.*, *Malton Board of Health v. Malton Manure Co.*, (1879) 4 Ex. D. 302; *Bishop Auckland Local Board v. Bishop Auckland Iron Co.*, (1882) 10 Q. B. D. 138, 141; see below, Chap. XVII.

3. *Cunard v. Antifyre, Ltd.*, (1933) 1 K. B. 551, 558, *per* Talbot, J.; below, Chap. XIV, para. 7.

4. *Andreae v. Selfridge & Co.*, (1938) 1 Ch. 1; above, para. 48.

5. *Cunard v. Antifyre, Ltd.*, (1933) 1 K. B. 551. Above, para. 12.

6. (1865) 3 H. & C. 774; (1866) L. R. 1 Ex. 265; (1868) L. R. 3 H. L. 330.

the reservoir and the plaintiff's colliery. The soil under the reservoir had been, at some former time beyond living memory, worked for coal and the old workings communicated with those under the intermediate lands. The defendants employed competent contractors and engineers for constructing the reservoir. When the persons employed for the work were excavating for the bed of the reservoir, they found some shafts filled up with soil and in three of them the timber sides remained. The reservoir had no embankment and the water level did not exceed the natural surface level of the land. Soon after water was brought into it, one of the shafts burst and water escaped through the underground workings to those under the intermediate lands and finally into the plaintiff's mines and flooded them. On these facts, the Court of Exchequer held against the plaintiff. On error in the Exchequer Chamber, Justice Blackburn, delivering judgment on behalf of the court, held that the plaintiff was entitled to recover and made the following well-known statement of the rule¹ :—

"We think that the true rule of law is, that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by shewing that the escape was owing to the plaintiff's default; or perhaps that the escape was the consequence of vis major, or the act of God; but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient."

In appeal the House of Lords approved of Justice Blackburn's statement of the law. Lord Cairns, however, rested the liability on the ground that the defendants' user of their land was non-natural.² The decision in this case has been regarded as establishing a rule of absolute liability like that of an insurer, in a particular class of cases.³ The rule is, however, qualified by a number of exceptions which considerably reduce the scope of its operation. It has therefore been suggested that the rule may be called as one of 'strict' and not absolute liability.⁴ It may be formulated thus. A person is, subject to the exceptions to be considered below, liable absolutely, *i.e.*, without any intent or negligence, if (a) he brings or accumulates on his land something likely to do mischief if it escapes, and (b) damage arises as a natural consequence of its escape.

1. 1 Ex. at pp. 279-280.

2. 3 H. L. at 339.

3. It has been suggested that the decision could be explained on the basis that there was negligence on the part of the contractors employed by the defendants and lays down only a rule of liability for the fault of a contractor; Street, Vol. I, pp. 62, 63; Salmond, Torts, 7th Ed., pp. 69, 360; *cf.*, 9th Ed., p. 602. Blackburn, J., however stated expressly (L. R. 1 Ex. p. 287) that he did not consider that question.

4. Dr. Winfield, 42 L. Q. R. 51; 4 Camb. L. J. 193; see also *per* Lord Wright in *N. W. Utilities v. London Guarantee & Accident Co.*, (1936) A. C. at p. 118. See however, Fifoot, English Law and its Background, p. 225n.

65. **Something likely to do mischief if it escapes.**—This phrase has been understood to apply to the following¹: water²; dangerous animals³; a motor car by reason of the petrol in it being inflammable⁴; engines sending sparks and setting fire to adjoining premises⁵; a chair-o-plane or a form of roundabout where the chairs are whirled about at great speed⁶; noxious gas⁷ and fumes;⁸ explosives;⁹ electricity;¹⁰ sewage;¹¹ a heap of colliery refuse on a hillside causing a landslide;¹² a Jew tree which overhangs another's land and by eating the leaves of which his cattle died;¹³ the decayed pieces of a wire rope which fell on adjoining land and poisoned a cow grazing there;¹⁴ vibrations caused by machinery resulting in damage to buildings;¹⁵ stones from blasting operations.¹⁶ Indeed there has been a tendency in some of these cases to extend the operation of the rule by treating anything which did mischief as one likely to do mischief, *e.g.*,

1. On this subject see the very useful article by Dr. Stallybrass on "Dangerous Things and the Non-natural User of Land", 3 Camb. L. J. 382.

2. *Hurdman v. N. E. Ry. Co.*, (1878) L.R. 3 C. P. D. 168; *Broder v. Saillard*, (1876) 2 Ch. D. 692; *Snow v. Whitehead*, (1884) 27 Ch. D. 588; *Western Engraving Co. v. Film Laboratories, Ltd.*, (1936) 1 A. E. R. 106; *Greenwood Tileries, Ltd v. Clapson*, (1937) 1 A. E. R. 765.

3. *Wyatt v. Rosherville Gardens Co.*, (1886) 2 T. L. R. 282 (bear); *Filburn v. The People's Palace & Aquarium Co.*, (1890) 25 Q.B.D. 258 (elephant); *O'Gorman v. O'Gorman*, (1903) 2 Ir., 593 (bees).

4. *Musgrove v. Pondelis*, (1919) 2 K. B. 43.

5. *Mansell v. Webb*, (1918) 88 L. J. K. B. 323; see also *Jones v. Festiniog Ry. Co.*, (1868) L. R. 3 Q. B. 733; *Powell v. Fall*, (1880) 5 Q. B. D. 597; *Gunter v. James*, (1908) 24 T. L. R. 868; *Moss v. Christ Church Kural Council*, (1925) 1 K. B. 750.

6. *Hule v. Jennings*, (1938) 1 A. E. R. 579; below, para. 81.

7. *Batcheller v. Tunbridge Wells*, (1900) 17 T. L. R. 765; *N. W. Utilities, Ltd., v. London Guarantee & Accident Co.*, (1936) A. C. 108; *Hanson v. Wearmouth Coal Co.*, (1939) 3 A. E. R. 47 C. A.

8. *Midwood v. Manchester Corporation*, (1905) 2 K. B. 597; *West v. Bristol Tramways Co.*, (1908) 2 K. B. 14.

9. *Rainham Chemical Works v. Belvedere Fish Guano Co.*, (1921) 2 A. C. 465; see also 38 & 39 Vic. c. 17; *Saliah Mohamed v. Abdul Sumath*, (1935) 69 M. L. J. 218; 157 I. C. 391.

10. *National Telephone Co. v. Baker*, (1893) 2 Ch. 186; *Dhanal v. Rangoon Indian Telegraph Association*, (1935) 1 L. R. 13 Rang. 369.

11. *Humphries v. Cousins*, (1877) 2 C. P. D. 239; *Ballard v. Tomlinson*, (1885) 29 Ch. D. 115; *Foster v. Warblington U.C.*, (1906) 1 K. B. 648; *Jones v. Llanrwst*, (1911) 1 Ch. 393.

12. *A. G. v. Cory Bros.*, (1921) 1 A. C. 521.

13. *Crowhurst v. Amersham Burial Board*, (1878) L. R. 4 Ex. 5. *Cheater v. Carter*, (1918) 1 K. B. 247; but not if the tree did not overhang and cattle put their mouths across the boundary and ate the leaves; *Ponting v. Noakes*, (1894) 2 Q. B. 281; see also *Stansfield v. Bolting*, (1870) 22 L. T. N. S. 799 (where a dog ate poisoned cheese kept under a counter for rats and fleas, the shopkeeper was held not liable).

14. *Firth v. Bowling Iron Co.*, (1878) 47 L. J. C. P. 358.

15. *Hoare v. McAlpine*, (1923) 1 Ch. 167. This has been criticised on the ground that vibrations are not dangerous things brought on land; Pollock, Torts p. 390, note (g).

16. *Arnold v. Furness Ry. Co.*, (1874) 22 W. R. 613; *Miles v. Forest Rock Granite Ry. Co.*, (1918) 34 T. L. R. 500. As to damage due to vibrations caused by blasting operations, see Jeremiah Smith, Selected Essays on Torts, p. 614.

wire rope ordinarily used for fencing,¹ a flag pole which fell on a person passing near.² The limit of its extension was perhaps exceeded in *A. G. v. Corke*³ where it was applied to human beings who, having been allowed by the defendant to bring their caravans on his land and dwell in them, caused trespass and nuisance on adjoining land. The extension was needless as the defendant was plainly liable for allowing persons to come on his land and create a nuisance to the neighbour.⁴ The rule was apparently intended to enforce a special and stringent liability only in cases where the dangerous character of the thing brought on land is well known. It has been held that it would not apply in the case of an accidental fall of a wall from the defendant's on the plaintiff's premises,⁵ of a piece of gutter from the upper floor of the defendant's house,⁶ or of a branch of a tree in his premises on a person in the highway.⁷ It is unnecessary, if a thing is dangerous within the rule that the defendant is aware or could be reasonably aware of it.⁸ It is usual to speak of 'dangerous things' as synonymous with the above phrase; but the dangerous character of a thing is relative,⁹ and as Justice Darling remarked,¹⁰ "nothing can be described as 'in itself dangerous' except, as Pope said, a little learning." Cattle are likely to escape and do mischief, *e.g.* to crops but not to men or to goods.¹¹ An overhanging tree will cause harm, *e.g.*, by impeding the growth of plants and trees in the adjacent land,¹² but it is not a dangerous thing in the sense that a branch might break and fall on a neighbour; and for such injury, the owner of the land on which the tree stands is not liable apart from negligence.¹³ In *Musgrove v. Pandelis*¹⁴ a motor car was regarded as falling within the rule by reason of the petrol in the tank being inflammable; but it

1. *Firth v. Bowling Iron Co.*, above; see also *Mullan v. Forrester*, (1921) 2 Ir. R. 412 (wall blown down into a highway).

2. *Shiffman v. St. John of Jerusalem*, (1935) 1 A. E. R. 557.

3. (1933) Ch. 89; see 49 L. Q. R. 158.

4. *E.g., R. v. Moore*, (1882) 2 B. & Ad. 184; above, para. 58.

5. *St. Annes Well Brewery Co. v. Roberts*, (1928) 44 T.L.R. 703; *Wilkins v. Leighton*, (1932) 2 Ch. 106; *Wilchick v. Marks*, (1934) 2 K. B. 56 at pp. 66, 67.

6. *Palmer v. Bateman*, (1908) 2 Ir. R. 392.

7. *Noble v. Harrison*, (1926) 2 K.B. 332.

8. *Humphries v. Cousins*, (1877) 2 C. P. D. 239; *Filburn v. People's Palace*, (1890) 25 Q.B.D. 258; *West v. Bristol Tramways Co.*, (1908) 2 K. B. 14; *Belvedere Fish Guano Co. v. Rainham Chemical Works*, (1922) 2 K. B. 487, 500.

9. See below, Chap. XIV, para. 47.

10. *Chichester Corporation v. Foster*, (1906) 1 K.B. at p. 177.

11. *Cox v. Burbridge*, (1863) 13 C.B.N.S. 430; *Heath's Garage v. Hodges*, (1916) 2 K.B. 370; *Manton v. Brocklebank*, (1923) 2 K.B. 212.

12. *Smith v. Giddy*, (1904) 2 K.B. 448. 13. *Noble v. Harrison*, (1929) 2 K.B. 332.

14. (1919) 2 K.B. 43; but the storing of 'proof alcohol' is not dangerous; *East India Distilleries v. Mathias*, (1928) 1 L. R. 51 Mad. 994 : 55 M.L.J. 663.

is not in the hands of a driver a dangerous thing on the road.¹ The use of the phrase "intrinsically dangerous things" in another context has now been disapproved by the House of Lords in *Donoghue v Stevenson*.² Where a thing does not fall within the above description, the liability can only be for negligence; thus a person who built a retaining wall on his land which broke a drain underneath, of which he was unaware, was held not liable as there was no negligence.³ In many of the instances in which the rule has been applied, the dangerous character of the thing was such that ordinary grounds of liability for negligence or nuisance were also available. There are two cases, *viz.*, animals and fire which call for special notice.

66. Injury by animals.—The law on this subject has developed on two different lines,⁴ (i) trespass by cattle, (ii) injury by animals known to be dangerous. Besides these two, there may also be alternative causes of action for negligence and nuisance.

67. Cattle-trespass.—The liability for cattle-trespass has been already considered.⁵ It was treated as a trespass so that damage need not be proved and nominal damages could be got for a mere entry. It was also treated as a nuisance and as a violation of the maxim "so use your own property as not to injure another's."⁶ It was this aspect of the wrong that was utilised in *Rylands v. Fletcher* as the basis of a rule of liability for anything that is likely to escape and do harm.⁷

68. Injury by dangerous animals.—There is a special rule of liability in the following cases: (a) keeping an animal with knowledge of its dangerous propensity, if it belongs to the species of tame animals, *e.g.*, a horse, dog or monkey; (b) keeping an animal which is, according to the experience of mankind, ferocious, *e.g.*, a lion or tiger.

69. Knowledge of the dangerous propensity of an animal.—The rule that a person who keeps an animal, *i.e.*, has possession and control of it,⁸ with knowledge of its dangerous propensity is liable for an injury

1. *Wing v. London General Omnibus Co.*, (1909) 2 K.B. 652; *Phillips v. Britannia Hygienic Laundry Co.*, (1923) 1 K.B. 539, 553; *Ryan v. Youngs*, (1938) 1 A.E.R. 522; below, para. 80.

2. (1932) A.C. 562; below, Chap. XIV, paras. 47, 57.

3. *Ilford U. D. C. v. Beal*, (1925) 1 K. B. 671; see also *Chadwick v. Trower*, (1839) 6 Bing N. C. 1; *Wilkins v. Leighton*, (1932) 2 Ch. 106.

4. *Buckle v. Holmes*, (1926) 2 K.B. 125; *Brackenborough v. Spalding U.D.C.*, (1942) A.C. 310, per Lord Wright.

5. Above, Chap. IV, paras. 24-26.

6. *Tenant v. Goldwin*, (1704) 2 Ld. Raym. 1089, per Holt, C.J.

7. For a criticism of this extension of cattle-trespass, see Winfield, *Law of Torts*, p. 539.

8. *Brackenborough v. Spalding U.D.C.*, (1942) A. C. 310; see also (1940) 1 K.B. 675, C.A.

caused by it has been recognised for a long time in England.¹ The leading modern authority is *May v. Burdett*² where a person was held liable for injury caused by a monkey of whose disposition to attack men he was aware. Actions have been allowed for injuries caused by a horse known to kick,³ a bull known to attack persons wearing red,⁴ a dog known to be savage,⁵ a ram notorious for butting.⁶ In this action, it is necessary to allege and prove knowledge, or *scienter*, as it is called from the phrase used in the old pleadings.⁷ Though it was really an action on the case for negligence, it is unnecessary to allege or prove negligence. Nor is it open to the defendant to prove its absence. The plaintiff must allege and prove the defendant's knowledge of the animal's dangerous tendency or disposition, *e.g.*, that his dog tried to spring on a person.⁸ It is not necessary to show that it had actually hurt another.⁹ Proof of *scienter* must relate to the particular harm caused; the fact that a horse was prone to bite other horses is not evidence when it bit a man. Knowledge of members of his family¹⁰ or of his servant¹¹ is knowledge of the defendant. Knowledge of a servant unconnected with the custody of the animal is not sufficient.¹² It is actual knowledge that should be proved and not mere means of knowledge.¹³ When the plaintiff does not allege or prove *scienter* he cannot recover for the injury. In *Mason v. Keeling*,¹⁴ Holt, C.J., refused to allow an action

1. Hale, P.C. 1, 430; *Mason v. Keeling*, (1699) 12 Mod. 332; *Smith v. Pelah*, (1747) 2 Str. 1253, where the owner of a dog was held liable for a second biting as he ought to have hung it on the first notice.

2. (1846) 9 Q.B. 101; see also *Jackson v. Smithson*, (1846) 15 M. & W. 563; *Card v. Case*, (1848) 5 C.B. 622; see *Mcquaker v. Goddard*, (1940) 1 K.B. 687 C.A.

3. *Lowery v. Walker*, (1911) A.C. 10; *Ganda Singh v. Chuni Lal*, (1915) 19 C.W.N. 916.

4. *Hudson v. Roberts*, (1851) 6 Ex. 697.

5. *Baker v. Snell*, (1908) 2 K.B. 825; *Osborne v. Chocqueel*, (1896) 2 Q.B. 109; *Gould v. McAuliffe*, (1941) 2 A.E.R. 527 C.A.; *Lennon v. Fisher*, (1923) 25 Bom L.R. 873; 1924 Bom. 207.

6. *Jackson v. Smithson*, (1846) 15 M. & W. 563.

7. See Rolle Abr. I, 4. For the history of '*scienter*', see Wigmore, Selected Essays on Torts, p. 30.

8. *Worth v. Gilling*, (1866) L.R. 2 C.P. 1; *Line v. Taylor*, (1866) 3 F. & F. 731; while trying the latter case, the story is related how Martin, B, a lover of dogs, had the dog in question, a ferocious one, brought near him and was caressing it and putting his fingers into its mouth, with the result that the jury gave a verdict for the defendant; see Beven, Negligence, Vol. I, p. 670.

9. *Osborne v. Chocqueel*, (1896) 2 Q.B. 109; *Glanville v. Sutton*, (1928) 1 K.B. 571.

10. *Gladman v. Johnson*, (1867) 36 L.J.C.P. 153; *Applebe v. Percy*, (1874) L.R. 9 C.P. 647.

11. *Baldwin v. Casella*, (1872) L.R. 7 Ex. 325; *Prakash v. Harney*, (1909) I.L.R. 36 Cal. 1021; 13 C.W.N. 1123.

12. *Stiles v. Cardiff Steam Navigation Co.*, (1864) 33 L. J. Q.B. 311; *Colget v. Norris*, (1887) 2 T.L.R. 471; *Knott v. L. C. C.*, (1934) 1 K.B. 126.

13. But see *White v. Steadman*, (1913) 3 K.B. 340, which was however a case of contract; *scienter* is unnecessary where there is a breach of a contractual duty to take care; *Smith v. Cook*, (1876) 1 Q.B. 179; see also *Simson v. London General Omnibus Co.*, (1873) L.R. 8 C.P. 390.

14. (1699) 12 Mod. 332.

for injury caused by a dog without such proof. In *Cox v. Burbidge*,¹ where the defendant's horse which was being depastured in a field near a road got into a road and kicked a child playing there, he was held not liable as there was no proof of scienter; nor could he be made liable in trespass as the injury happened not in the plaintiff's premises but in a highway. In *Manton v. Brocklebank*,² the defendant was held not liable for injury to the plaintiff's horse by his mare kicking it, while both were grazing in another's field. Similarly actions were dismissed, where an ox which was being led through a street escaped into an adjoining shop and did damage without any negligence of the person in charge of it,³ a cat trespassed into another's land and ate his pigeons and fowls,⁴ a cat with kittens on seeing the plaintiff with his dog bit both,⁵ the defendant's fowls frightened by a dog barking at them flew into a bicycle on which the plaintiff was riding on a road.⁶ In the case of dogs an exception has been enacted in England by the Dogs Act,⁷ which provides that "the owner of a dog shall be liable in damages for injury done to any cattle by that dog; and it shall not be necessary for the person seeking such damages to show a previous mischievous propensity in the dog, or the owner's knowledge of such previous propensity, or to show that the injury was attributable to neglect on the part of the owner." A dog is therefore no longer allowed his "first bite" at cattle, but retains the privilege against other animals and against men.

70. Ferocious animals.—In the case of animals of the ferocious species, *i.e.*, known to mankind to be ferocious, the plaintiff need not prove scienter but can recover for the injury on proof that it was caused by an animal of that kind kept by the defendant. Though the rule was laid down long ago,⁸ there have not been many occasions for applying it in England to which the wild animals of the tropics are alien.⁹ An elephant was classed as an animal of that kind both by the English Court of Appeal¹⁰ and the Madras High Court,¹¹ but in Burma a different view was taken.¹² The

1. (1863) 13 C.B.N.S. 431. Above, Chap. IV, para. 26.

2. (1923) 2 K.B. 212; above, Chap. IV, para. 26.

3. *Tillet v. Ward*, (1882) 10 Q.B.D. 17; see *Lathall v. Joyce & Son*, (1939) 3 A.E.R. 854.

4. *Buckle v. Holmes*, (1926) 2 K.B. 125.

5. *Clinton v. Lyons*, (1912) 3 K.B. 118.

6. *Hadwell v. Righton*, (1907) 2 K.B. 345.

7. (1871) 34 & 35 Vict. c. 56; (1906) 6 Edw. VII, c. 32. The liability under this Act of two persons whose dogs attacked a flock of sheep is, as under the general law, joint and several for the whole damage; *Arneil v. Paterson*, (1931) A.C. 560.

8. Hale, P.C. I, 430; *Mason v. Keeling*, (1699) 12 Mod. 332; *R. v. Higgins*, (1730) 2 Ld. Raym. 1583.

9. *Besonzi v. Harris*, (1855) 1 F. & F. 92 (a bear); *Marlor v. Ball*, (1900) 16 T.L.R. 239 (a zebra).

10. *Filburn v. People's Palace*, (1890) 25 Q.B.D. 258.

11. *Vedapuratti v. Koppan Nair*, (1911) 1 L.R. 35 Mad. 708; 21 M.L.J. 434.

12. *Maung Kyow v. Ma Kyin*, (1900) 7 Bur. L.J. 73.

test as to whether an animal falls under the one class or the other is the "experience of mankind."¹ In *Manton v. Brocklebank*,² the Court of Appeal refused to hold that a horse when left at large with other horses in a field is a dangerous animal. It may cause harm occasionally by kicking or biting but it was not a fact of such notoriety that a court must take judicial notice of it. In *Mc Quaker v. Goddard*³ the Court of Appeal recently held that a camel is not a wild animal. "Camels are nowhere in the world to be found in a wild state". A visitor to a Zoo who was bitten by a camel while giving an apple to it was held not entitled to sue the owner of the Zoo in the absence of proof of scienter of the particular animal's vicious tendency. The test of liability is the keeping or possession of the ferocious animal.⁴ Whether the defendant was in possession of it is a question of fact.⁵ It is unnecessary that the defendant should be its owner.⁶ He is however not liable if he has not brought or kept it but it is naturally on the land and escapes, e.g., a wild animal in his forest, rabbits or rats on his land.⁷ In view of the above clear test it is unnecessary to go back to old distinctions between animals *feræ naturæ* and animals *mansuetæ naturæ*, or between those in which a man has valuable property for the purpose of suing them in trover⁸ or for their being distrained,⁹ or for the purpose of the law of larceny, and those in which he has no such property. The older views as to civil liability based on these tests are not relevant for the present purpose.¹⁰ Thus it was formerly the view in England—based on the Roman law¹¹—that in the case of wild animals or animals *feræ naturæ* a person has no property and was not liable for the harm done by them after their escape from his custody.¹²

71. Liability for animals apart from the above rule.—Where the case does not fall under the above two heads, the plaintiff can recover only if he proves some cause of action like negligence or nuisance. (a) *Negligence*.—It is negligence to try an unruly horse in a crowded

1. *Filburn v. People's Palace*, above. It is a question of law for the judge and not of fact for the jury. 2. (1923) 2 K.B. 212. 3. (1940) 1 K.B. 687, per Scott, L.J.

4. *Brady v. Warren*, (1900) 2 Ir. R. 632 (the defendant held liable for damage done by deer which had escaped six years ago and had been at large ever since); *Vedapuratti v. Koppan Nair*, (1911) I.L.R. 35 Mad. 708 : 21 M.L.J. 434.

5. *North v. Wood*, (1914) 1 K.B. 629 (father held not liable for dog kept by daughter at her expense in his house). Above, para. 69.

6. *Mc Kone v. Wood*, (1831) 5 C. & P. 1.

7. *Brady v. Warren*, (1900) 2 Ir. R. 632; *Stearn v. Prentice*, (1919) 1 K.B. 394.

8. E.g., *Hannam v. Mockett*, (1824) 2 B. & C. 934 (rooks).

9. As to dstraint of deer, see Sm. L.C. Vol. I, 503.

10. *Manton v. Brocklebank*, (1923) 2 K.B. at pp. 218, 219.

11. Inst. 4, 9.

12. *Boulston's case*, (1597) 5 Co. Rep. 104 (b) (coney-boroughs); *Cooper v. Marshall*, (1757) 1 Burr. 259 (rabbits); as to a fox, see Com. Dig. A. 5; *Mitten v. Faudyre*, (1624) Popp. 161; Holt's dictum in *Mason v. Keeling*, (above, Chap. IV, para. 27) was influenced by these old views.

place,¹ to take an unbroken colt in a highway where it is likely to be frightened by cars or lights,² to allow a dog to run about in a crowded street,³ to leave a horse unattended in or near a highway, thus allowing it to escape into the highway and do damage,⁴ to leave a milk-cart and pony unattended on the road with the result that the pony caught a passer-by and bit her,⁵ to keep beehives near a neighbour's land with knowledge that the bees fly into it.⁶ But it is not negligence merely to take cattle without a light on a highway,⁷ to leave a dog with no vicious propensities inside a saloon car on the road in the owner's absence during shopping, when the dog jumped about and broke the glass pane from which a bit flew and hurt the eye of a passer-by,⁸ or to take out racing greyhounds, merely because they like other dogs are likely to chase cats or bite the rescuer thereof.⁹

While in the case of animals kept or led in a highway, the case-law presents no difficulty, it is otherwise in the case of animals escaping from adjoining land to a highway. Certain cases of which *Heath's Garage Ltd. v. Hodges*¹⁰ is a prominent instance have laid down the rule that an owner of land adjoining a highway owes no duty to prevent the escape of his animals on his land to the highway or to keep his fence or gate in order or closed to prevent such escape. In *Heath's Garage Ltd. v. Hodges* the defendant's sheep had emerged into the highway from a gap in a hedge fencing a field occupied by him and two of the sheep while running on the highway to join the rest of the flock got under a motor car and overturned it. An action for injury to the car was dismissed on the ground, first, that the defendant was not under any duty to prevent the escape of the sheep into the highway, second, that even if there was a breach of such a duty, the damage was not its natural consequence. Similarly in an earlier case,¹¹ some cows had escaped from defendant's land into the highway through a gate which was open at the time and threw down a cyclist on the road. An action was dismissed on the ground that there was no proof that the gate was left open by the defendant or his servants and there was no

1. *Michael v. Alestree*, (1676) 2 Lev. 172.

2. *Turner v. Coates*, (1917) 1 K.B. 670; *Pinn v. Rew*, (1906) 32 T.L.R. 45.

3. *Pitcher v. Martin*, (1937) 3 A.E.R. 918; also a nuisance, *per Atkinson, J.*

4. *Gayler v. Davies*, (1924) 2 K.B. 75; *Deen v. Davies*, (1935) 2 K.B. 282.

5. *Aldham v. United Dairies*, (1940) 1 K.B. 507 C.A.

6. *O'Gorman v. O'Gorman*, (1903) 2 Ir. R. 573.

7. *Catchpole v. Minster*, (1914) 109 L.T. 953. As to bees, see *Kearry v. Pattinson*, (1939) 1 K.B. 471 C.A.

8. *Fardon v. Harcourt-Rivington*, (1932) 49 T.L.R. 215 (H.L.). See also *Sycamore v. Levy*, (1932) 147 L.T. 342.

9. *Toogood v. Wright*, (1940) 2 A.E.R. 306 C.A.

10. (1916) 2 K.B. 370 C.A.

11. *Ellis v. Banyard*, (1912) 106 L. T. 51 C. A.; see also *Jones v. Lee*, 106 L. T. 123; *Higgins v. Searle*, (1909) 100 L. T. 280.

duty to prevent its being opened by a stranger. The rule enunciated in these cases appears to be too broad and rigid and would hamper the proper application of the principle of due care. In *Brackenborough v. Spalding Urban District Council*¹ the House of Lords held recently that the owner of an ancient market held in part of a highway owed no duty to provide safe pens to prevent the escape of cattle brought to the market or to provide any pens at all. The defendant Council who owned the market was therefore held not liable for the escape of a steer brought there by a farmer for grading and certification from the pen provided for it and its running out and knocking down a person on the highway who died of the injuries. The case of the market-owner is different from that of an owner of an animal kept on his land and therefore this decision is not to be regarded as justifying the broad rule stated above. Indeed the House of Lords expressly reserved for future consideration the existence, meaning and scope of that rule. But till it is reconsidered it is regarded as binding on the English Courts with results which are very unsatisfactory. In *Hughes v. Williams*² the plaintiff sued for injury to his motor car caused by two horses coming and colliding with it on a dark morning. He had stopped his car on hearing the noise of horses but they came and hit his car. The defendant had kept them in his stable which led to a yard from which there was a gate opening into a highway but the gate was found open. The Court of Appeal held the plaintiff could not recover. Green, M. R., observed that the rule was singularly ill-adapted to the realities of modern conditions, but much as he disliked it, he was bound to follow it. He said, "A farmer who allows his cow to stray through a gap in his hedge on to his neighbour's land, where it consumes 2s. 6d. worth of cauliflowers is liable in damages to his neighbour; but if through a similar gap in the hedge, it strays upon the road and causes the overturning of a motor omnibus, with death or injury to 30 or 40 people, he is under no liability at all. I can scarcely think that that is a satisfactory state of affairs in the 20th century". It has been recognised that there may be special circumstances which make the rule inapplicable and would sustain an action for negligence for injury caused by the escape of animals into a highway,³ but there is no clear authority indicating such circumstances. On both questions, duty and causal relation, the decision in *Heath's Garage Ltd. v. Hodges* is not beyond controversy and in any case such decisions might well be treated as proceeding on particular facts and not as laying down an inflexible rule of law. Such a rule will be too wide and unreasonable in some cases. If for instance a horse or bullock is likely to be frightened by a motor car and to run amok and knock down a person on the road, there is no reason why

1. 1942 A.C. 310: (1942) 1 A.E.R. 34, 41, per Lord Wright.

2. (1943) 1 A.E.R. 535 C.A. 3. *Ibid*, p. 537.

duty and causal connection should be denied. Similarly neglect in due care and custody of animals which may escape into a road congested with modern fast-moving traffic and become a source of obstruction might well be regarded as actionable. But if a horse having no known vicious propensities escapes from custody and celebrates its freedom by biting a passer-by the position is different.¹ In some other contexts the law of negligence had to be released from the cramping influence of rigid rules and formulae.² In this context also a similar release is required. (b) *Nuisance*. The plaintiff can also succeed if he proves a public or private nuisance due to the animals and the damage to be its natural consequence.³

72. **Theory of absolute liability for harm done by animals.**—In *Rylands v. Fletcher*, Justice Blackburn regarded the old rule of liability for the escape of cattle and the rule of liability in *May v. Burdett* for injury by the escape of dangerous animals as authorities for the principle of absolute liability. It may be observed however that the analogy between the two rules is only on the surface. They differ in some important respects.⁴ The liability for damage done by the escape of cattle was always regarded as absolute and was remedied by the action of trespass.⁵ Damage done by other animals was remedied by an action on the case of negligence, and scienter has been regarded only as proof of negligence.⁶ It is difficult to regard the rule in *May v. Burdett* as an instance of absolute liability, because it requires knowledge of the dangerous character of the animal, while such knowledge is unnecessary in the case of other things likely to do mischief.⁷ The case of damage by a wild animal was regarded as an exception to the normal rule requiring proof of scienter.⁸ Besides, while cattle-trespass is a form of nuisance, harm done by a dangerous animal may be actionable though it did not escape from the defendant's land into another's as where a vicious dog kept by the defendant attacks a guest in his house.

1. *Aldham v. United Dairies*, (1940) 1 K.B. 507, 511, C.A., per Lord Greene, M. R.; *Cox v. Burbidge*, above, p. 216, note 1) would belong to this class of cases and does not necessarily support the cases cited above. 2. Chap XIV, para 60; Chap. II, para. 6.

3. *Dewell v. Sanders*, (1618) Cro. Jac. 490 (private nuisance due to pigeons); *Farrer v. Nelson*, (1885) 15 Q.B.D. 259; see 41 & 42 Vict. c. 68 (prohibition of keeping the Colorado beetle).

4. They also differed in the way they came into the English law. In origin no doubt both were traceable to the noxal surrender of ancient times. But while the rule of cattle-trespass prevailed both in the English and the Roman law, the latter rule came from French sources; Wigmore, *Selected Essays on Torts*, p. 31.

5. Above, Chap. IV, para. 24.

6. *Fleming v. Orr*, (1855) 2 Macq., (H. L. Sc.) 23, per Lord Cranworth; see also *May v. Burdett*, (1846) 9 Q. B. at p. 101, per Lord Denman, C. J.

7. Above, para. 65. 8. Hale, I, 430; Wigmore, *Selected Essays on Torts*, p. 73.

73. **Fire.**—In England it was enacted by a statute of George III.¹ that “no action shall be maintained against a person in whose house, chamber, stable, barn or other building or in whose estate any fire shall accidentally begin.” The position in England prior to this Act was that under the common law or “the custom of the realm,” an owner of a house was absolutely liable for damage due to fire in his premises, unless it was due to an act of God or of a trespasser.² In *Turberville v. Stamp*,³ Holt, C.J., and other judges held that the custom of the realm applied to a fire made by a man in his field as well as in his house and that he was answerable for a fire started by his servant.

“He must at his peril take care that it does not, through his neglect, injure his neighbour; if he kindle it at a proper time and place, and the violence of the wind carry it into his neighbour’s ground, and prejudice him, this is fit to be given in evidence.”

It must, however, be borne in mind that we should not read into this or other old authorities the modern distinction between different forms of liability. When Holt, C. J., used the phrases ‘at his peril’ and ‘neglect’ in the same breath, he could have had no such distinctions in his mind. The result of the Act is that a person is not liable for damage due to fire beginning accidentally in his premises.⁴ He is, however, liable for fire caused wilfully or negligently by himself⁵ or by others in his house or estate with his permission, but not by a stranger or trespasser.⁶ The negligence may consist in allowing a fire to begin or allowing a fire which began by accident or by the act of a stranger to spread⁷. The wilful or negligent conduct may be on the part of the occupier’s servant,⁸ contractor,⁹ invitee or

1. The Fires Prevention (Metropolis Act), 1774 (14 Geo. III, c. 78) s. 86. In spite of its title, it was a general law applicable to the whole country; *Filliter v. Phippard*, (1847) 11 Q. B. 347; The Railway Fires Prevention Act, 1905 (5 Ed. 7, c. 11), and (Amendment Act, 1923, make railway companies liable for damage to agricultural land or crops up to £ 200, when the damage is due to fire from sparks from their locomotives.

2. *Filliter v. Phippard*, (1847) 11 Q. B. 347, per Lord Denman; *Musgrove v. Pandelis*, (1919) 2 K. B. 43, 46.

3. (1697) 12 Mod. 152; for an earlier authority see *Beaulieu v. Finglam*, (1401) Y. B. Hen. IV fol. 18 pl. 5, per Markham, J.; Kenny, Cases on Torts, p. 589.

4. *Collingwood v. Home and Colonial Stores*, (1936) 3 A.E.R. 200; below, para. 76.

5. *Mulholland & Tedd Ltd. v. Baker*, (1939) A. E. R. 253.

6. *Filliter v. Phippard*, (1847) 11 Q.B. 347; see also *Vaughan v. Menlove*, (1837) 3 Bing. N. C. 468, which is notable for Tindal, C. J.’s enunciation of the standard of care in the law of negligence; see below, Chap. XIV, para. 3; cf. a case under French Civil Code, *Pigneguy v. Yemen Ltd.*, 1943 P.C. 108.

7. See per Scrutton, L. J., in *Job Edwards v. Birmingham Navigations*, (1924) 1 K.B. at p. 361; Duke, L. J. in *Musgrove v. Pandelis*, (1919) 2 K. B. at 51.

8. *Jefferson v. Derbyshire Farmers*, (1921) 2 K.B. 281. A servant acting outside the scope of his authority is a stranger; *McKensie v. McLeod*, (1834) 10 Bing. 385.

9. *Black v. Christ Church Finance Co.*, (1894) A.C. 48; *Honeywill & Stein, Ltd. v. Larkin Bros.*, (1934) 1 K.B. 191; below, Chap. XVI.

licensee. In *Musgrove v. Pandelis*,¹ the Court of Appeal held that the Act does not exclude liability under the rule in *Rylands v. Fletcher*, for fire which arose accidentally from inflammable material brought by him on his premises.² In that case the defendant was held liable for damage due to fire which arose in a garage occupied by him and spread to the plaintiff's rooms above and burnt them and his furniture. The fire arose when the defendant's servant started the engine to move his car. The servant had little skill as a chauffeur and was besides negligent in not turning off the petrol tap as soon as he saw a fire starting in the carburettor, so that it did not spread to the tank and assume greater proportions. The decision could, therefore, have been rested wholly on the ground of his negligence or the negligence of the defendant in allowing an unskilled servant to deal with the car.³ The Act would not apply to a fire which is the result of bringing on one's land any inflammable material like an explosive⁴ or a dangerous operation like taking a flash-light photograph of the interior of a building.⁵ The Act does not also exclude liability for breach of contract. A book-binder was held liable to pay the value of the books which the plaintiff had entrusted to him, though the books were destroyed by an accidental fire in his house.⁶ As there is no similar enactment in India, there is no difficulty in applying the rule in *Rylands v. Fletcher* to fires which begin by accident from dangerous things brought by a person on his land.

74. Bringing or accumulating on the land.—The rule applies only if the defendant brings or accumulates on his land something that is likely to escape and do mischief. It will not apply to the escape of things naturally on the land, *e.g.*, rain water flowing from an upper to a lower land,⁷ sub-soil water percolating from a higher to a lower mine,⁸ rocks slipping from an upper on a lower land owing to action of the weather.⁹

1. (1919) 2 K.B. 43. See also *Mulholland & Todd, Ltd. v. Baker*, (1939) 3 A.E.R. 253. The older cases of *Jones v. Festiniog Ry. Co.*, (1868) L.R. 3 Q.B. 733, and *Powell v. Fall*, (1880) 5 Q.B.D. 597 where railway companies were held liable for fire due to sparks could be explained on the ground of nuisance or negligence.

2. The opinion of Bankes, L.J., that the rule of *Rylands v. Fletcher*, was in existence in the common law before the Act and did not come within its operation appears to be open to the objection that it introduces modern distinctions into mediaeval rules of liability, as to which see Holdsworth, Vol. VIII, p. 468; Wigmore, Selected Essays on Torts, pp. 78, 79; below, para. 83.

3. *East India Distilleries v. Mathias*, (1928) I.L.R. 51 Mad. 994; 55 M.L.J. 663, *per* Coutts-Trotter, C.J.

4. *Rainham Chemical Works v. Belvedere Co.*, (1921) 2 A.C. 465.

5. *Honeywill & Steins, Ltd. v. Larkin Bros.*, (1934) 1 K.B. 191.

6. *Shaw v. Symmons*, (1917) 1 K.B. 799.

7. Above, para. 27.

8. *Smith v. Kenrick*, (1849) 17 C.B. 515; see also *Bartlett v. Tottenham*, (1932) 1 Ch. 114; for other cases, see below, para. 75.

9. *Pontardawe Rural D. C. v. Moores-Gwyn*, (1929) 1 Ch. 656.

weeds, vermin or wild animals naturally on the land.¹ In such cases, liability is not absolute but may arise by negligence.² Where a third party has brought or accumulated a dangerous thing on the defendant's land without his knowledge or leave, the defendant is not liable. He would, however, be liable if he negligently allowed the danger to continue.³ The rule may apply to the person who brought it. Where the defendant permits him to do so, both would be absolutely liable.⁴

75. Restriction of the rule to extraordinary user.—To the above formula that 'the defendant is liable if he brings or accumulates on his land something likely to do mischief if it escapes,' there is high authority⁵ for interposing a condition that the bringing or accumulation should be a non-natural or extraordinary user of land; or in other words, natural or ordinary user is suggested as a defence or exception to the rule of absolute liability. Lord Cairns's judgment in *Rylands v. Fletcher*,⁶ has lent support to this view. There are two classes of cases where this defence has been usually invoked: first, the working of mines on one's land with the result that underground water which is set free percolates, by force of gravitation, to mines on a lower level, and second, the use of water-closets, cisterns, gutter pipes, etc., on the upper floor from which water escapes by accident to the lower floor in a house. In the first class of cases it has been settled for a long time that there is no liability, if the owner of the upper mine works it in the ordinary and usual way.⁷ But it is otherwise if he pumps

1. *Boulston's Case*, (1597) 5 Co. Rep. 104 (b) (coney-boroughs); *Cooper v. Marshall*, (1757) 1 Burr. 259 (rabbits); *Giles v. Walker*, (1890) 24 Q.B.D. 656 (thistles); *Brady v. Warren*, (1900) 2 Ir. R. 632 (rabbits); *Stearn v. Prentice*, (1919) 1 K.B. 394 (rats). It is otherwise if the defendant uses his land for gathering or breeding game; *Farrer v. Nelson*, (1885) 15 Q.B.D. at p. 260.

2. *Proprietors of Margate Pier and Harbour v. Margate Town Council*, (1869) 20 L.T.N.S. 564; above, para. 58.

3. *Whitmores, Ltd. v. Stanford*, (1909) 1 Ch. at p. 438; see also *Brady v. Warren*, (1900) 2 Ir. R. 632; *Edwards v. Birmingham Navigations*, (1924) 1 K.B. 341; *Smith v. G. W. Railway, Co.*, (1926) 42 T.L.R. 391 (the defendants, a railway company, held not liable as there was no negligence in stopping the leak in a petrol tank placed in their premises by the consignor).

4. *Rainham Chemical Works v. Belvedere Fish Guano Co.*, (1921) 2 A.C. 465; (1920) 2 K.B. 487, 500.

5. Farwell, L.J., in *West v. Bristol Tramways Co.*, (1908) 2 K.B. at p. 23; Fletcher-Moulton, L.J., in *Wing v. London General Omnibus Co.*, (1909) 2 K.B. at p. 665; and in *Richards v. Lothian*, (1913) A.C. 263; Lord Buckmaster in *Rainham Chemical Works v. Belvedere Fish Guano Co.*, (1921) 2 A.C. 465 at 471; Slessor & Scott, L.J.J., in *Western Engraving Co. v. Film Laboratories, Ltd.*, (1936) 1 A.E.R. 106; *Sedleigh-Denfield v. O'Callaghan*, (1940) A.C. 880 at p. 888, per Lord Maugham.

6. Above, para. 64.

7. *Smith v. Kenrick*, (1849) 7 C.B. 515; *Lomax v. Stott*, (1870) 39 L.J. Ch. 834; *Fletcher v. Smith*, (1877) 2 A.C. 781; *Wilson v. Waddell*, (1876) 2 A.C. 95; *West Cumberland Iron & Steel Co. v. Kenyon*, (1879) 11 Ch. D. 782; *Bartlett v. Tottenham*, (1932) 1 Ch. 114; *Rouse v. Gravel Works Ltd.*, (1940) 1 K.B. 489 C.A. See also *Wilkins v. Leighton*, (1932) 2 Ch. 106.

water on to other property.¹ Similarly a person is entitled to protect his land from a flood by putting up an embankment though the result may be that the water finds its way into another's land;² but he has no right to divert a flood which had come on his land to other property for relieving his own.³ It is possible to explain the immunity of the mine-owner without resort to this defence. The rule itself does not apply to him, because he neither brings nor accumulates water on his land.⁴ Besides, he can rely on another ground of excuse, *viz.*, that the owner of the lower mine voluntarily took the risk of its inundation by altering the natural condition of his land and not guarding himself against the results of that alteration by leaving sufficient barriers against percolation of water.⁵ The English Court of Appeal held recently that the defence of natural user is not confined to the mine-owner. A person who dug gravel in his land and thereby made a pit thereon was held not liable when the water collecting in the pit was blown by wind on the edge of the adjoining land and caused damage by erosion.⁶ In the second class of cases,⁷ a similar ground of defence is available, because a person who occupies the lower floor of a house with such usual features of domestic convenience as a cistern or a water-closet in the upper floor may be deemed to have agreed to take the risk of any accidental escape of water not due to the negligence of the occupier of the upper floor. Where the water was intended for the use of the plaintiff also in the ground floor, then the defence of implied consent is stronger. In *Carstairs v. Taylor*,⁸ water on the roof of a warehouse was collected in

1. *Baird v. Williamson*, (1863) 15 C.B.N.S. 376; *Westminster Brymbo Coal & Coke Co. v. Clayton*, (1866) 36 L.J. Ch. 476; *cf. Westhoughton Coal & Cannel Co. Ltd. v. Wigan Corporation Ltd.*, (1939) Ch. 800, C.A.

2. *Nield v. L. & N. W. Ry. Co.*, (1874) L.R. 10 Ex. 4; *Gerrard v. Crowe*, (1921) 1 A.C. 395; see also *R. v. Paghram*, (1828) 8 B. & C. 355; *Mensies v. Breadalbane*, (1828) 3 Bligh. (N.S.) 414; *Shidramappa v. Mahomed*, (1920) 22 Bom. L.R. 1107: 59 I.C. 391; as to driving away a swarm of locusts, see *Greyvensteyn v. Hattingh*, (1911) A.C. 355.

3. *Whalley v. L. & Y. Ry. Co.*, (1884) 13 Q.B.D. 131; *Sami Ullah v. Mokund Lal*, (1921) I.L.R. 43 All. 688: 19 A.L.J. 736; *M. S. M. Ry. Co. v. Maharaja of Pithapuram*, I.L.R. (1937) Mad. 919: 1937 Mad. 703; *Kurshed v. Secretary of State for India*, 1937 Pat. 302.

4. *Cf. Mohotal v. Bai Jivkore*, (1904) I.L.R. 28 Bom. 472: 6 Bom. L.R. 529 (the defendant who dug a trench for a foundation which resulted in water collecting there and damaging the plaintiff's wall, not liable); *Kenaram v. Srishtidar*, (1912) 16 C.W.N. 875: 15 I.C. 543 (the defendant lowered land for cultivation which resulted in flood running over it on to the plaintiff's, not liable).

5. *Rylands v. Fletcher*, (1868) L.R. 3 H. L. at pp. 339, 341.

6. *Rouse v. Gravelworks Ltd.*, (1940) 1 K.B. 489 C.A.

7. *Carstairs v. Taylor*, (1871) L.R. 6 Ex. 217; *Ross v. Fedden*, (1872) I.R. 7 Q.B. 661; *Anderson v. Oppenheimer*, (1890) 5 Q.B.D. 602; *Blake v. Land and House Property Co.*, (1886) 3 T.L.R. 667; *Gill v. Edouin*, (1895) 11 T.L.R. 378; *Blake v. Woolf*, (1898) 2 Q.B. 426; *Kiddle v. City Business Premises*, (1942) 2 A.E.R. 216.

8. (1871) L.R. 6 Ex. 217.

a water-box made of wood and discharged by a pipe into a drain. The box and pipe were from time to time examined by a competent person employed by the defendant, but in the interval between two dates of examination a rat gnawed a hole in the water-box and water escaped and damaged the goods of the tenant of the ground floor. The plaintiff was held not entitled to recover. In *Ross v. Fedden*¹ where water from a water-closet which was kept for the sole use of the occupant of the upper floor escaped and damaged the plaintiff's goods in a lower floor, Justice Blackburn observed that to such a case *Rylands v. Fletcher* would not apply. In *Rickards v. Lothian*² the plaintiff's goods were damaged by the escape of water from a lavatory basin in an upper floor due to the mischievous act of a stranger in opening the tap and plugging the waste-pipe. In delivering the judgment of the Privy Council Lord Moulton held that the act of a stranger was a good excuse but added also that the rule in *Rylands v. Fletcher* had no application to ordinary user of land or such a use as is proper for the general benefit of the community.³ Similarly where the defendants stored water in the second floor of certain premises for their manufacturing purposes, they were held liable for the escape of water to a lower floor and that the above defence was not available to them; but the defendants were also found to have been negligent in that case.⁴ In *Peters v. Prince of Wales Theatre Ltd.*⁵ the plaintiff, a lessee from the defendants, complained of water escaping from a theatre on the upper floor to his shop below and damaging his goods. The water escaped from the sprinkler system installed in the theatre. The sprinkler heads which were attached to water pipes froze in the severe frost in January 1940 and when the thaw came there was a flood. It was held that there was no negligence on the part of the defendants.

76. *Criticism of the theory of 'extraordinary user.'*—It is submitted that notwithstanding the dicta in the above and other cases, there is not sufficient warrant for imposing the condition of extraordinary user on the operation of the rule. In a large class of cases the condition seems to be really involved in the phrase, 'likely to escape and do harm,' which can only be applied to unusual or hazardous works or undertakings. But its addition as a part of the rule appears to introduce needless difficulties. To keep cattle or to have a drain in a man's premises is an ordinary or natural use of property but if cattle or sewage escape to adjoining property he is liable. Even to grow a tree may involve the grower in liability if overhanging branches or spreading roots injure his neighbour's property.⁶

1. (1872) L.R. 7 Q.B. 661; cf. *Cheater v. Cater*, (1918) 1 K.B. 247 (a lessee of premises with yew trees).
2. (1913) A.C. 263.

3. (1913) A.C. at p. 279. See *Tilley v. Stevenson*, (1938) 4 A.E.R. 207 C.A. (defendant not liable for water escaping without his knowledge and before his occupation).

4. *Western Engraving Co. v. Film Laboratories, Ltd.*, (1936) 1 A.E.R. 106.

5. (1943) 1 K.B. 73.

6. Above, para. 38.

Besides the phrases 'natural' and 'ordinary' are vague and indefinite and would deprive the rule of much of its precision and certainty.¹ In *Nichols v. Marsland*² Baron Bramwell said that a reservoir was a reasonable use of property beneficial to the community. In *Farrer v. Nelson*³ Pollock, C.B. expressed the opinion that a person was making a natural use of his land by bringing a reasonable quantity of game (*viz.*, pheasants) though they went and ate his neighbour's corn. In *Stearn v. Prentice*⁴ the plaintiff complained that the defendant kept a heap of bones for manufacture of manure and the bones caused rats to gather which escaped and ate the plaintiff's corn. The defendant was held not liable on the ground that rats were *feræ naturæ* and the defendant was not responsible for their coming on the land, and also on the further ground that it was not proved that the defendant had kept any excessive quantity of bones. This would suggest that he was making a proper user of his land. It has been observed in recent cases that the bringing of gas⁵ or electricity⁶ for lighting or other domestic purposes is a natural user of land. These cases illustrate the difficulties involved by the use of the above phrases. It has already been observed that natural or ordinary user is also no defence *per se* to ordinary liability for nuisance.⁷

77. Escape of the thing and consequential damage.—The second condition of the rule is that the thing escaped⁸ and caused damage as a natural consequence.⁹ The damage must be substantial. In *Eastern & South African Telegraph Co. v. Cape Town Tramways Co.*¹⁰, the plaintiffs, a telegraph company, complained of interference with the working of a specially sensitive recording apparatus by the escape of electricity from electric cables of the defendants, a tramway company. The plaintiffs could not recover, because there was no tangible or sensible injury to any person or property, unless it was "to the paper which was smudged by the

1. "Natural user" should not be confused with "things naturally on the land" because it may be natural user to bring things artificially on the land; *per* Lawrence, L.J. in *Bartlett v. Tottenham*, (1932) 1 Ch. at p. 131. Above, para. 46.

2. (1875) L. R. 10 Ex. at 260; below, para. 80.

3. (1885) 15 Q.B.D. at p. 258.

4. (1919) 1 K. B. 394; *cf.* *Bland v. Yates*, (1914) 55 Col., J. 612 (a case of nuisance by fleas and rats); *O'Gorman v. O'Gorman*, (1903) 2 Ir. R. 593 (nuisance by wild bees); above, para. 39.

5. *Miller v. Addie & Sons, Collieries*, (1934) S.C. 150 (Ct. of Sess.).

6. *Colingwood v. Home & Colonial Stores*, (1936) 1 A. E. R. 74; 3 A.E.R. 200; *Dhanal v. Rangoon Indian Telegraph Assn.*, (1935) L.L.R. 13 Rang. 369.

7. Above, paras. 46 and 61.

8. *Ponting v. Noakes*, (1894) 2 Q.B. 281 (the defendant held not liable for the plaintiff's horse eating the leaves of a yew tree within the defendant's boundary); see also *Wilson v. Newberry*, (1871) L.R. 7 Q.B. 31.

9. *Goodbody v. Poplar Borough Council*, (1915) 84 L. J. K. B. 1230 (the defendants who stored electricity in a chamber held not liable for explosion due to gas leaking from adjoining gas mains and mixing with a burnt fuse in the chamber).

10. (1902) A.C. 391.

eccentric action of the recording apparatus." Lord Robertson observed that "a man cannot increase the liabilities of his neighbour by applying his own property to special uses, whether for business or pleasure."¹ This decision should not be understood to lay down that a person is not liable for injury to weak or delicate property. In *Hoare v. McAlpine*² it was held that the defendant was liable under the rule of absolute liability for causing structural damage to an old and unstable house by vibrations due to his driving a large number of piles in his premises.

78. Extension of the rule in *Rylands v. Fletcher*.—Though the rule was laid down in a case of injury to the property of an adjoining occupier the width of its language has led to its extension beyond the sphere of nuisance. It has thus outgrown its original dimensions and has become a general rule of liability in the law. In *Charing Cross Electric Supply Co. v. London Hydraulic Power Co.*,³ it was held that the rule could be applied as between two persons who were using a highway and that the defendants whose water pipes were laid near the plaintiff's electric cables under a road were liable for damage arising to the cables from water bursting from their pipes. Similarly the rule would apply to a dangerous thing brought by the defendant on a highway and injury arising to a person passing along,⁴ or to a person or property near the highway.⁵ A person who is not the occupier of property, *e.g.*, a guest or invitee in it may sue for harm caused by the escape of a dangerous thing from the defendant's land.⁶

79. Exceptions to the rule in *Rylands v. Fletcher*.—The exceptions or defences that have been recognised in *Rylands v. Fletcher* and later cases are: (a) the act of God, (b) the act of a third party, (c) the plaintiff's own fault, (d) the plaintiff's consent, (e) statutory authority. The act of the King's enemies may also be a defence ⁷ but no instance of it has arisen.

1. (1902) A.C. at p. 393.

2. (1923) 1 Ch. 167; above, para. 65, note 14.

3. (1914) 3 K.B. 772. See *Goodbody v. Poplar Borough Council*, (1914) 84 L.J.K.B. 1230; *Batcheller v. Tunbridge Wells*, (1901) 17 T.L.R. 765; *Hanson v. Wearmouth Coal Co.*, (1939) 3 A.E.R. 47 C.A.

4. *Per* Fletcher-Moulton, L.J. in *Wing v. London General Omnibus Co.*, (1909) 2 K.B. 652 at 655.

5. *North Western Utilities, Ltd. v. London Guarantee & Accident Co.*, (1936) A.C. 108; below, para. 81.

6. *Miles v. Forest Rock Granite Co.*, (1918) 34 T. L. R. 500; *Goodbody v. Poplar Borough Council*, (1914) 84 L. J. K. B. 1230.

7. *Per* Mellish, L. J. in *Nichols v. Marsland*, (1876) 2 Ex. D. at p. 5.

80. Act of God.—This term¹ refers to such overwhelming operations of natural forces as a tempest or an extraordinary rainfall and flood. In *Greenock Corporation v. Caledonian Railway Co.*,² the House of Lords adopted the following definition of a similar phrase in the Scotch law :

"*Damnum fatale* occurrences are those circumstances which no human foresight can provide against, and of which human prudence is not bound to recognise the possibility, and which when they do occur, therefore, are calamities that do not involve the obligation of paying for the consequences that may result from them."

Such occurrences are recognised also as exceptions to another rule of absolute liability in law, *viz.*, the liability of common carriers for the loss of goods entrusted to them.³ This defence involves the condition that the defendant is not guilty of negligence or a breach of duty to take the precautions required in the circumstances to avoid damage arising from such occurrences. In this sense the defence should be available also for the smaller liability arising in an ordinary action for negligence. In *Ryan v. Youngs*⁴ the defendant's driver who appeared quite fit when he took out his car died suddenly while driving and the car swerved on the pavement and hurt the plaintiff. The Court of Appeal held that the defendant could not foresee such an event and was not liable for negligence or nuisance. Slessor, L. J. described the event as an act of God. The well-known cases relating to this defence arose out of extraordinary rainfall.⁵ The latent defect in the soil which led to the flow of water underground in *Rylands v. Fletcher* was evidently not an act of God.⁶ In *Nichols v. Marsland*,⁷ the defendant had some artificial lakes in his land and on account of an extraordinary rainfall and flood, the embankments were breached and water escaped and damaged the plaintiff's

1. As to its use in the Roman law, see D. 19, 25, 5; D. 39, 2, 24, 4; other equivalents were *damnum fatale* (D. 4, 9, 3, 1; D. 18, 6, 2, 1), *vis naturalis* (D. 19, 2, 59), *vis major* (D. 4, 9, 3, 1); and *casus major* (D. 44, 7, 1, 4); for the use of the term *force majeure*, see *Matsoukis v. Priestman & Co.*, (1915) 1 K. B. 681. The Latin maxim was *actus Dei nemini facit injuriam*. In *G. W. Ry. Co. v. S. S. Mostyn*, (1928) A. C. at p. 93, Lord Phillimore said of the phrase that it was "an untheological expression well understood by lawyers", but Lord Blanesburgh in the same case "gave a theological colour to it and spoke of it as an irresistible and unsearchable Providence nullifying all human effort"; Salmond, Torts, p. 594.

2. (1917) A.C. 556 at p. 576.

3. *Forward v. Pittard*, (1785) 1 T. R. 27; below, Chap. XV, para. 7.

4. (1938) 1 A. E. R. 522. Cf. *The Saint Angus*, (1938) P. 225.

5. *Thomas v. Birmingham Canal Co.*, (1879) 43 L. T. 435; *Dixon v. Metropolitan Board of Works*, (1881) 7 Q. B. D. 418; *Blyth v. Birmingham Water Works*, (1856) 11 Ex. 781 (a case of frost but not pleaded as act of God). In *Turberville v. Stamp*, (1697) 1 Ld. Raym. 264, Holt, C. J. suggested a tempest as a possible excuse to liability for fire.

6. In *Dixon v. Metropolitan Board of Works*, (1881) 7 Q. B. D. at p. 422, Lord Coleridge said, "I do not feel sure that I have mastered the distinction in principle between the cases, *Rylands v. Fletcher* and *Nichols v. Marsland*."

7. (1875) L. R. 10 Ex. 255; 2 Ex. D. 1.

property. It was found as a fact by the jury that there was no negligence in the construction of the lakes and the rain was excessive. It was, therefore, held that the defendant was not liable. On the other hand where the defendant is under a duty to take precautions against an extraordinary rainfall, flood or other natural forces and is guilty of a breach of that duty, the defence fails.¹ In *Greenock Corporation v. Caledonian Railway Co.*² the Corporation of Greenock in Scotland had diverted a natural stream for constructing a paddling pond for children and was held liable for the damage done by an extraordinary rainfall and flood. The House of Lords distinguished the decision in *Nichols v. Marsland* on the ground that it proceeded, first, on the footing that the case was one merely of accumulation of water in a reservoir which did not require the same degree of care as diversion of a natural stream,³ and secondly, on the verdict of the jury that there was an act of God.⁴ Whether there is a duty to take precautions against extraordinary events like an unusual flood or storm would depend on the facts in each case. If there is such a duty, an extraordinary rainfall or storm is no more an act of God than an ordinary shower or even a drop of rain, though all these are acts of God in a literal sense.⁵ The duty of a person who builds a dam and obstructs the natural flow of a river is to prevent damage and if damage results, he is liable.⁶ In *Nichols v. Marsland*⁷ Baron Bramwell observed, "I am by no means sure that if a man kept a tiger, and lightning broke his chain, and he got loose and did mischief, the man who kept him would not be liable." This opinion appears to be inconsistent with a rule which admits act of God as an exception. It would, however, be intelligible if the rule were really one of absolute liability which it is not. Such a rule would impose on persons who engage in ultra-hazardous activities like keeping wild animals or explosives

1. *Nitrophosphate Chemical Manure Co., v. London & St. Katherine Docks Co.*, (1878) 9 Ch. D. 503, 519; *City of Montreal v. Watt*, (1922) 2 A.C. 555; *Baldwins, Ltd. v. Halifax Corporation*, (1916) 85 L.J.K.B. 1774; *A.G. v. Cory Bros.*, (1921) 1 A.C. 521, 536; *Ruck v. Williams*, (1868) 3 H. & N. 308; *Harrison v. G. N. Ry. Co.*, (1864) 3 H. & C. 231.

2. (1917) A.C. 556. See *Slater v. Worthington's Cash Stores*, (1941) 1 K.B. 488.

3. *King v. Southern Canada Power Co.*, 1937 P.C. 319.

4. The effect of the decision in (1917) A.C. 556 is however to throw considerable doubt on the correctness of the decision on the facts in *Nichols v. Marsland*; per Scrutton, L.J., in *A.G. v. Cory Bros.*, (1919) 35 T.L.R. p. 574.

5. *Ruck v. Williams*, (1858) 3 H. & N. 308, 319, Bramwell, B. said: "There is a French saying 'there is nothing so certain as that which is unexpected'. In like manner, there is nothing so certain as that something extraordinary will happen now and then." Therefore the defendants were guilty of negligence in not providing against a storm in 50 years; for a similar case, see *City of Montreal v. Watt*, (1922) 2 A.C. 555.

6. *R. v. Southern Canada Power Co.*, (1937) 3 A.E.R. 923, at p. 928, per Lord Maugham.

7. L.R. 10 Ex. at p. 260. The learned judge invoked a distinction between beneficial user and its opposite for this purpose. See also Farwell, L.J. in *Barker v. Herbert*, (1911) 2 K.B. at p. 647.

a liability for consequences of unforeseeable natural occurrences.¹ In other contexts² the phrase 'act of God' bears different meanings. For instance in the law of common carriers it is used by way of contrast with the act of man. A common carrier is excused in the case of loss of goods in a storm, but is liable for loss due to theft or robbery, as otherwise he might collude with thieves and robbers.³ On the other hand in the present context, acts of God and of man are both valid excuses.

81. Act of a Stranger.—In *Box v. Jubb*⁴ the defendant was held not liable for the escape of water from his reservoir due to the act of a third person who without the defendant's authority or knowledge emptied the water of his own reservoir into the defendant's. This defence, like that of act of God, involves the condition that the defendant is not negligent, and has not committed a breach of duty to take the necessary precautions against the interference of strangers. The facts of each case must determine the kind of precautions that are required. Sometimes a person may be bound to provide against the interference of not merely his servants, but licensees on his premises, contractors, or even trespassers. He may be bound to guard not merely against the neglect but even the wilful acts of these people. The question whether a person is a stranger for the purpose of this defence, therefore, properly falls under the issue of negligence. In *Stevens v. Woodward*⁵ the defendant was held not liable when his servant washed his hands in a private lavatory which he was forbidden to use, and forgot to turn off the water-tap and thereby flooded the lower floor in the premises. Here the defendant was not guilty of any negligence as he had taken the necessary care by instructing his servants not to use the water-tap, and therefore the servant could be treated as a stranger for the present purpose. In *Rickards v. Lothian*⁶ it was found as a fact that there was a failure to provide against the risk of negligent use of the water-closet, but a breach of duty to provide against wilful or wanton wrongdoing by a stranger was neither alleged nor found. Therefore the defendant was held not liable. In circumstances of greater gravity the duty will be

1. Such a rule is recognised in some American decisions and is proposed in the Draft Restatement, 1935, Chap. 20. Below, para. 84, note 1; Chap. XV, para. 1.

2. In contracts where 'an act of God' is mentioned as an event saving liability for breach, its meaning will be determined by the context. In the case of a ship-building contract an exception of "*force majeure*" was held to include a coal strike which disabled one of the parties from performing the contract, but not a football match or a funeral though they were also alleged to have had a similar effect; *Matsoukis v. Priestman & Co.*, (1915) 1 K.B. 681; in a contract for personal services, permanent illness is 'an act of God'; *Boast v. Firth*, (1868) L.R. 4 C.P. 1; see also *Lebeaupin v. Crispin*, (1920) 2 K.B. 715; *Hackney Borough Council v. Dore*, (1922) 1 K.B. 431.

3. Below, Chap. XV, para. 7.

4. (1879) L.R. 4 Ex. D. 76; see also *Wilson v. Newberry*, (1871) L.R. 7 Q.B. 31.

5. (1881) 6 Q.B.D. 318. 6. (1913) A.C. 263 at pp. 272, 274; above, para. 75.

higher. In the case of fire there may be a duty to answer for the wilful or negligent acts of servants, contractors, guests, or others lawfully in one's premises.¹ In *North Western Utilities, Ltd. v. London Guarantee & Accident Co.*,² a gas company was held liable for failure to watch the operations of the sewer authority near its gas mains and guard against interference with them and consequent leakage of gas which escaped into and destroyed certain premises. In *Hale v. Jennings Brothers*,³ the defendants who owned and operated a machine known as chair-o-plane which was a form of roundabout with chairs whirling at great speed, were held liable when one of the chairs became detached by the interference of its occupant and fell on the plaintiff. In *Baker v. Snell*,⁴ there are dicta⁵ which suggest that this defence is not available in cases of keeping dangerous animals. This view like the dictum of Baron Bramwell suggesting that the defence of act of God is not available in such cases is not consistent with the statement of the rule in *Rylands v. Fletcher*. If it were accepted, the rule would have a different character and content. Even then it may be doubtful if the keeper of a wild animal would be liable for the wholly wilful act of a third party.⁶ The learned judges who propounded the above view rested it on the theory that the keeping of a dangerous animal is wrongful *per se*. This is open to the criticism, first, that no action lies for the mere keeping until damage arises, and secondly, that liability even for wrongful or negligent conduct extends only to its direct consequences and not to consequences which are due wholly to an independent agency. If the theory were right, managers of zoological gardens and circus-proprietors who keep wild animals for public amusement or for business would be continual wrongdoers.

82. Plaintiff's own fault, plaintiff's consent and statutory authority.—These are not special defences and apply also to normal rules of liability. They may be briefly noticed here. (a) Plaintiff's own fault.—This defence was recognised long ago in the case of cattle-trespass where it was due to the plaintiff's breach of duty to fence his land.⁷ Similarly a person cannot complain of injury due to his meddling with a dangerous

1. Above, para. 73.

2. (1936) A.C. 108.

3. (1938) 1 A.E.R. 579.

4. (1908) 2 K.B. 352, on appeal, *ibid*, p. 825; about this case, see Beven, *Selected Essays on Torts*, p. 572; Pollock, 25 L.Q.R. 317; Salmond, *Torts*, p. 562. The facts of this much-discussed case were that the defendant, a keeper of a public house, had a dog known to be savage and the servant whose duty was to take it out and chain it, took it to the kitchen and said: "I will bet the dog will not bite anyone in the room" and let it go, saying "Go it, Bob" whereupon it flew at the plaintiff, the housemaid, and bit her. The trial Court dismissed her action on the ground that the servant's wilful act was not in the course of his employment. The appellate Courts disagreed and sent the case for re-trial as that issue had to be submitted to a jury.

5. *Per* Cozens-Hardy, M. R., Farwell, L. J., and Sutton, J.; contra, *per* Kennedy, L. J. and Channell, J.

6. (1908) 2 K. B. at p. 354, *per* Channell, J.

7. Above, Chap. IV, para. 25.

thing¹ or to his trespassing in another's premises,² or to some neglect on his part.³ (b) Plaintiff's consent.—It is illustrated by such cases as *Carstairs v. Taylor*,⁴ *Rikards v. Lothian*.⁵ (c) Statutory authority—This defence was upheld by the Privy Council in *Madras Railway Co. v. The Zamindar of Karvetnagar*,⁶ where a tank maintained by a zamindar under statutory authority breached by excessive rainfall. The defendant must make out that the particular act causing damage was authorised by statute expressly or by necessary implication ; for instance, an authority to make a road pavement was held not to excuse the bringing of creosote causing an explosion.⁷

83. Criticism of the rule in *Rylands v. Fletcher*.—Though the rule in *Rylands v. Fletcher* has been adopted by the English Courts,⁸ and has become part of the common law, some difficulties in it cannot be ignored and may be here stated. (a) It purports to be a rule of absolute liability,⁹ but in reality, it is not, by reason of its exceptions. It was apparently designed to meet the danger arising from hazardous works and undertakings which were then becoming common with the advance of science and industry, but perhaps from a sense of caution against making the responsibility too large, was hedged round with exceptions which were only added to in later cases like *Rikards v. Lothian*. (b) It is open to the criticism that it is really unnecessary. Though it was propounded in 1867 and since invoked in numerous cases, liability could have been imposed in most of them on the ground of negligence.¹⁰ As the rule does not seem to do more than cast the onus of proving absence of negligence and causation on the

1. *Marlor v. Ball*, (1900) 16 T. L. R. 239.

2. *Sarch v. Blackburn*, (1830) 4 C. & P. 297.

3. *Holden v. Liverpool New Gas Coal & Coke Co.*, (1846) 3 C. B. 1; *Lomax v. Stott*, (1870) 39 L. J. Ch. 834.

4. (1871) L. R. 6 Ex. 217.

5. (1913) A. C. 263; above, para. 75.

6. (1874) 1 I.A. 364; for other cases see *Dunn v. Birmingham Canal Co.*, (1872) L. R. 8 Q. B. 42; *National Telephone Co. v. Baker*, (1893) 2 Ch. 186; *Green v. Chelsea Water Works*, (1894) 70 L. T. 547; *Markland v. Manchester Corporation*, (1934) 1 K. B. 566, 577; (1936) A. C. 360; as to prescription, see below, para. 86.

7. *West v. Bristol Tramways Co.*, (1908) 2 K. B. 14; *Dell v. Chesham, U.C.*, (1921) 3 K. B. 427; *Farnworth v. Mayor of Manchester*, (1929) 1 K. B. 533.

8. Also adopted in Scotland; *Eastern & South Africa Telegraph Co. v. Cape Town Tramways Co.*, (1902) A. C. at p. 394. It has no counterpart in the Roman law (Pollock, Torts, p. 390 note (h)) or in the systems of law founded on it in the continent; Schuster, German Civil Law, p. 346. Both the German and French Civil Codes have a rule of absolute liability for keeping dangerous animals.

9. As to this phrase, above, para. 64.

10. In *Dhanal v. Rangoon Indian Telegraph Association, Ltd.*, (1935) I.L.R. 13 Rang. at pp. 377, 388, Page, C.J. stated that "the rule in *Rylands v. Fletcher* is only an application of the doctrine of negligence and quantifies the degree of care in certain cases". It would be perhaps more correct to say that the rule might have done so.

defendant, it has been observed¹ that the principle of *res ipsa loquitur*² in the law of negligence would serve the same purpose. The rule was perhaps considered useful as a convenient formula which would dispense with the trial of the issue of negligence by judge and jury in certain classes of cases. (c) It is inadequate to meet new situations for which the doctrine of negligence is also inadequate. Thus for the dangers due to the flight of aircraft a different rule which imposed a liability even for accidents which could not be averted by all possible care and might be due to acts of God was necessary and was supplied by legislation in England.³ (d) In form it lacks precision and clearness. We have seen that the phrase 'likely to do mischief and escape' is vague and inartistic.⁴ The phrases 'non-natural', 'abnormal', or 'extraordinary user' are open to the same criticism.⁵ A rule intended to apply to things so imperfectly described cannot be satisfactory. It has led to the curious result that the only things which can with any certainty be regarded as dangerous within the rule are cattle, water, or filth from a drain. But gas or electricity supplied for domestic use and a motor car driven on a road are not⁶; nor according to an Act of Parliament is a household fire.⁷ (e) The historical basis of the rule is also open to criticism.⁸ In formulating it Justice Blackburn relied on precedents in three classes of cases, cattle-trespass, injury by dangerous animals and escape of water, filth and stenches.⁹ While the first was an instance of absolute liability we have seen that cases of the second class were really actions of negligence.¹⁰ The third class belongs to the category of nuisance which usually arises from some wilful or negligent conduct.¹¹ The precedents in these cases also belong to a period when principles of liability were in a crude stage of development and the modern distinction between liability for negligence and liability independent of it could not have emerged. Justice Blackburn introduced what was really a new doctrine on the strength of the above precedents by putting a modern interpretation on phrases like 'acting at one's peril' used in them. This mode of introducing the doctrine however determined its form and content. So we have a rule which equates cattle, wild animals and explosives as dangerous things by finding a common factor in them, *viz.*, their tendency to escape and do harm. The rule in *Rylands v. Fletcher* is thus an

1. Pollock, Torts, p. 391, note (q); Jeremiah Smith, *Selected Essays on Torts*, p. 218; Thayer, *ibid.*, pp. 603 to 605, 611. 2. Below, Chap. XIV, para. 95.

3. Above, Chap. II, para. 10. 4. Above, para. 65. 5. Above, para. 76.

6. Above, para. 76; Dr. Stallybrass in 3 Camb L.J. 382-5. 7. Above, para. 73.

8. Winfield, 4 Camb. L.J. 193; 42 L. Q. R. 37. See also note 1 above. Professor Wigmore had however high praise for the rule; *Selected Essays on Torts*, p. 77.

9. L.R. 1 Ex. at pp. 280 to 286. Lord Cranworth invoked the mediæval rule of liability in trespass; L.R. 3 H.L. at p. 341.

10. Above, paras. 69 and 72.

11. Above, paras. 38 and 61.

interesting illustration of the methods as well as the limitations of judicial legislation of which it is an outstanding example.

84. **The rule in *Rylands v. Fletcher* in the United States.**—The rule has been followed by the courts of certain States¹ but others either reject it wholly² or restrict it to unusual and extraordinary user.³ The phrases 'usual,' 'ordinary,' and 'reasonable user' are interpreted liberally. It has been held that storage of water by means of a dam for power for mills,⁴ of gas by a gas company,⁵ or of steam in a boiler⁶ is not extraordinary user, and liability can arise only on proof of negligence of the defendant or of his servant or contractor. The attitude of these courts has been explained on the ground that considerations of public interest and economic advantage differ in a new and undeveloped country from those in England and the rule in *Rylands v. Fletcher* would by its extreme insistence on the rights of landowners unduly hamper productive enterprise.⁷

85. **The rule in *Rylands v. Fletcher* in India.**—In India the doctrine of *Rylands v. Fletcher* has been accepted, though rarely enforced, by the courts.⁸ But it is inapplicable to the numerous irrigation tanks in this country which are maintained under authority conferred by statute, prescription or custom.⁹ Besides it has been observed that storing water in a tank for agricultural purposes is in this country a natural and lawful user of property and the submersion of lands on the foreshore of a tank when it is at its full tank level is a recognised and customary feature of the

1. *E.g.*, Minnesota. On this subject see Bohlen, *Studies*, p. 345; Burdick, *Torts*, p. 506; R. C. L. Vol. XX, p. 866. The Draft Restatement (Tentative Draft No. 12, 1935, Chap. 20) has however proposed a rule of absolute liability for cattle-trespass, injury by wild animals and ultra-hazardous activities like blasting operations. This rule does not admit of exceptions like act of God. In some States the rule as regards cattle-trespass is not observed in the interests of cattle-farming. Below, Chap. XV.

2. *E.g.*, New York.

3. *E.g.*, Kentucky.

4. *City Water Power Co. v. City of Fergus Falls*, (1910) 113 Minn. 33 : 128 N. W. 817.

5. *Gould v. Winona Gas Co.*, (1907) 100 Minn. 259; 111 N.W. 254.

6. *Huff v. Austin*, (1889) 46 Ohio St. 386; 21 N.E. 864.

7. Bohlen, *Studies*, p. 368.

8. *Madras Railway Co. v. Zamindar of Karvetnagar*, (1874) 1 I.A. 364, 387; *Ram Lall v. Lill Dhary*, (1877) I.L.R. 3 Cal. 776; *Moholal v. Bai Jivkore*, (1904) I.L.R. 28 Bom. 472, 476; 6 Bom. L. R. 529; *Ramanujachariar v. Krishnaswami*, (1907) I. L. R. 31 Mad. 169; *Kenaram v. Sristidhar*, (1912) 16 C.W.N. 875; 15 I.C. 543; *East India Distilleries v. Mathias*, (1928) I.L.R. 51 Mad. 994; 55 M. L. J. 663; *cf. Gooru Churn v. Ram Dutt*, (1865) 2 W.R. 43 decided before *Rylands v. Fletcher*. Sir F. Pollock was against applying the rule in India; *Torts*, p. 395; *Fraud*, p. 52.

9. *Madras Ry. Co. v. Zamindar of Karvetnagar*, (1874) 1 I.A. 364 (statute); *Ram Lall v. Lill Dhary*, (1877) I.L.R. 3 Cal. 776 (prescription); *Shahyad Ali v. Shyam Pratab*, (1917) 41 I.C. 382 (Pat.) (custom). As to responsibility of Government in maintaining irrigation works, see *Sanharavadivelu v. Secretary of State for India*, (1904) I. L. R. 28 Mad. 72; 15 M.L.J. 32.

irrigation system.¹ But it may be negligence to fail to take adequate precautions against damage resulting from new irrigation works.²

86. Defences to liability for nuisance.—Besides general defences which are discussed later, some special defences are grant³ and prescription. A right to continue a nuisance can be acquired by prescription if it has been peaceably and openly enjoyed as an easement and as of right, without interruption and for twenty years.⁴ It is essential that the thing to do which a right is claimed should have been a nuisance during the whole period of twenty years. In *Sturges v. Bridgman*⁵ the defendant had used certain noisy machinery for more than twenty years. The plaintiff, a doctor, was actually disturbed by the noise only shortly before the action when he built a consulting room in his land near the defendant's premises. It was held that the defendants had not acquired a prescriptive right to cause the nuisance by noise. The plaintiff's coming to the nuisance was at one time supposed to be a good defence so that even if a nuisance came into existence shortly before the plaintiff became occupier, he could not complain. This doctrine was a relic of the old rule of procedure that an assize of nuisance lay only at the instance of a free-holder who was in possession when the nuisance arose.⁶ It was repudiated in the last century⁷ and the law now knows no such defence. It is also no defence that the defendant was making a reasonable or convenient use of his property or locality,⁸ that the nuisance complained of would not arise merely from the act of the defendant without the contributory acts of third parties,⁹ or that it arose in the course of acts or works done for public benefit.¹⁰

1. *Gajapati Krishna Chandra Deo v. Rajah of Vizianagaram*, (1930) 60 M.L.J. 662; *Seshadri v. Narasimhachari*, 36 L.W. 408; 1932 Mad. 532; *Shanmugavel v. Venkataswami*, 43 L.W. 197; 1936 Mad. 202. Above, para. 21.

2. *Raja of Vizianagaram v. Sanyasiraju*, 1939 Mad. 653.

3. Indian Easements Act, ss. 8, 13; for instances of implied grant, see *Hall v. Lund*, (1863) 1 H. & C. 676; *Lytleton Times Co. v. Warners*, (1907) A.C. 476; *Jones v. Prichard*, (1908) 1 Ch. 630; *Pollack Collieries Co. v. Woodman*, (1915) A.C. 634.

4. Indian Easements Act, s. 15.

5. (1879) 11 Ch. D. 852; *Liverpool Corporation v. Coghill*, (1918) 2 Ch. 307; see also above, para. 24.

6. Holdsworth, Vol. VII, p. 330; it survived in old authorities; e.g., Blackstone, ii, 403.

7. *Elliotson v. Feetham*, (1835) 2 Bing. N.C. 134; *Bliss v. Hall*, (1838) 4 Bing. N.C. 183; *Tipping v. St. Helen's Smelting Co.*, (1865) L.R. 1 Ch. 66; *Ebrahim Pir Muhammad v. Ganga Ram*, 1930 Sind 310.

8. *Bamford v. Turnley*, (1862) 3 B. & S. 62; above, para. 46.

9. As to pollution of water, see above, para. 23, p. 178, notes 2 and 3; see also *Lambton v. Mellish*, (1894) 3 Ch. 163 (noise). The wrongdoers are not jointly but only severally liable, and cannot be joined in the same action; *Sadler v. G. W. Ry. Co.*, (1896) A.C. 450.

10. *Shelfer v. City of London Electric Lighting Co.*, (1895) 1 Ch. 287; see also above, para. 23.

87. Remedies.—The extra-judicial remedy is abatement. The judicial remedies are damages and injunction. In India there is also a special remedy provided by the Criminal Procedure Code to prevent disturbances of easements or other incorporeal rights.¹ In England the Public Health Act, 1936,² designates certain nuisances as “statutory nuisances” and enables private parties aggrieved by them as well as local authorities to initiate summary proceedings before a justice of the peace who can order abatement as well as a fine.

88. Abatement of nuisance.—A person may abate or remove a nuisance, e.g., an obstruction to way, light, water, etc. If he does so, he loses the right of action.³ The right of abatement is subject to the following conditions. (a) If it is necessary to enter on the wrongdoer's land for abatement, the wrongdoer must, except in cases of great emergency, be first asked to abate the nuisance himself.⁴ (b) If the nuisance is due to an act of omission and not an act of commission, a similar notice is essential before abatement is made,⁵ except in cases of great emergency.⁶ But this principle does not apply to the removal of trees or branches which stand in a person's land and overhang another's. In *Lemmon v. Webb*,⁷ it was held that the latter may cut them without notice. (c) A public nuisance can be abated only when and to the extent to which special damage is caused to the abater.⁸ In cases of nuisance arising from non-repair of a highway, there is no right to make repairs under colour of abatement of the nuisance.⁹ (d) The nuisance should be abated without causing unnecessary damage. A person removing a gate or a fence obstructing a way will not be justified in breaking it if it was unnecessary to do so. Where a structure, say, a dam or weir is in part lawful and in part unlawful, a party abating that which is unlawful cannot justify interference with the rest. He must distinguish them at his peril.¹⁰ When however a person had a prescriptive right to send down waste water through another's drain and sent also filth from his privies, the latter was held justified in blocking the drain altogether, as the prescriptive right was inseparable from the nuisance.¹¹ If there are two ways of abating a nuisance, a person must choose the less mischievous of the two,

1. S. 147.

2. 26 Geo. 5 and 1 Ed. 8 c. 49, Part III.

3. *Baten's case*, (1610) 9 Co. Rep. 53 b; *Lagan Navigation Co. v. Lambeg Bleaching & Co.*, (1927) A. C. 226 at p. 244.4. *Lemmon v. Webb*, (1895) A. C. 1.5. *Penruddock's case*, (1598) 5 Rep. 100 b; *Jones v. Williams*, (1843) 11 M. & W. 176.6. *Earl of Lonsdale v. Nelson*, (1823) 2 B. & C. 302.

7. (1895) A. C. 1.

8. *Bagshaw v. Buxton, L.B.*, (1875) 1 Ch. D. 220; *Mayor of Colchester v. Brooke*, (1845) 7 Q. B. 339; *Dimes v. Peiley*, (1850) 15 Q. B. 276; *Seaton v. Salma*, (1933) 75 L. J. 45; *Narasimhulu v. Nagur Sahib*, (1933) 1 L. R. 57 Mad. 351; 66 M. L. J. 31.9. *Campbell v. Lloyd*, (1901) 2 Ch. 518.10. Pollock, Torts, p. 336; *Greenstade v. Halliday*, (1830) 6 Bing. 379.11. *Cawkwell v. Russell*, (1856) 26 L. J. Ex. 34.

though it may be more onerous to him.¹ (e) A nuisance must not be abated in such a way as to lead to a breach of the peace,² e.g., by proceeding to pull down without notice a house where the owner is living.³

89. History of the right of abatement.—Abatement is an extra-judicial remedy coming down from ancient times.⁴ It was once of an extensive character and included even pulling down houses or filling up ditches.⁵ But in course of time it came to be regarded with disfavour⁶ and hedged round, like the right of distress, with conditions of an onerous character. Many centuries ago Hale advised parties to appeal to a court of justice and his advice has been repeated by later judges.⁷

90. Right of abatement in modern times.—At the present day the right of abatement is rarely exercised and the only familiar instance of it is the removal of overhanging branches of trees.⁸ The right extends to trees standing for more than twenty years as there cannot be a prescriptive right to have an overhanging tree which is ever growing and changing.⁹ The right, however, does not justify the removal and appropriation of the timber or the fruits of overhanging trees.¹⁰ Though the law discourages abatement by individuals, modern legislation confers

1. *Roberts v. Rose*, (1865) 4 H. & C. 103, per Blackburn, J.

2. *Mayor of Colchester v. Brooke*, (1845) 7 Q. B. 339 at 377; *Perry v. Fitzhove*, (1846) 8 Q. B. 757.

3. *Perry v. Fitzhove*, above; *Jones v. Jones*, (1862) 1 H. & C. 1; otherwise if notice had been given, *Davies v. Williams*, (1851) 16 Q.B. 546; *Burling v. Read*, (1850) 11 Q.B. 904.

4. Holdsworth, Vol. III, p. 279. It was then enforced by the writs of assize and *quod permittat*, as to which see Blackstone, Vol. iii, p. 221.

5. Street, Vol. I, p. 215.

6. *Lagan Navigation Co. v. Lambeg Bleaching & Co.*, (1927) A.C. 248; *Sedleigh-Denfield v. O'Callaghan*, (1940) A. C. 880 at pp. 899, 900, per Lord Atkin; *Maksod Ali v. Ma Hli*, (1924) I. L. R. 2 Rang. 450.

7. *Earl of Lonsdale v. Nelson*, (1823) 2 B. & C. at p. 311, per Best, J.

8. *Lemmon v. Webb*, (1895) A.C. 1; of roots of trees, *Butler v. Standard Telephones and Cables*, (1940) 1 K. B. 399; also in respect of obstruction of rights of common; Pollock, Torts, p. 334. As regards Indian cases on this type of nuisance, see *Hari Krishna v. Shanker*, (1894) I. L. R. 19 Bom. 420; *Lakshmi Narain v. Tara Prasanna*, (1904) I. L. R. 31 Cal. 944; 8 C. W. N. 710; *Deo Dutt v. Kauleshwar*, (1915) 28 I. C. 843 (All.); *Maung Shwe v. Ma Kin*, (1917) 42 I. C. 92 (Bur.); *Vishnu v. Vasudev*, (1918) I. L. R. 43 Bom. 164; 20 Bom. L. R. 826; *Bhudeb v. Kalachand*, (1921) 34 C. L. J. 315; 1921 Cal. 129; *Maung Po v. Ma Gye*, (1923) I. L. R. 1 Rang. 281; *Mahabali v. Manu Mandal*, 1924 Pat. 416; *Arunugha v. Rangaswami*, (1938) 1 M. L. J. 510; 1938 Mad. 511; *Gokal v. Hamira*, 1936 Lah. 134. It has been held that the extra-judicial and judicial remedies are co-extensive and available without proof of damage; *Vishnu v. Vasudev*, (1918) I.L.R. 43 Bom. 164; 20 Bom. L. R. 826; cf. *Lane v. Capsey*, (1891) 3 Ch. 411 (as to right to abate an obstruction of light for which no mandatory injunction could be got).

9. *Hari Krishna v. Shanker*, (1894) I. L. R. 19 Bom. 420; *Keshav v. Shanker*, (1925) 27 Bom. L. R. 663; 1925 Bom. 446; *Arunugha v. Rangaswami*, above; cf. *Secretary of State for India v. Zamindar of Saptur*, (1937) 46 L. W. 862.

10. *Mills v. Brooker*, (1919) 1 K. B. 555; *Mahabali v. Manu Mandal*, 1924 Pat. 416; *Syed Hakimullah v. Samiullah*, 1935 All. 750.

large powers of abatement on public and municipal authorities.¹ In India, the Easements Act has enacted in the interests of public peace that the dominant owner cannot abate a wrongful obstruction of an easement.² He can for instance clear a way blocked by a fallen tree or deviate on adjacent land of the servient owner³ but cannot remove any obstruction placed by the latter or force a way against the latter's will.⁴ In provinces to which this Act does not apply, the rules of the English law are followed.⁵

91. Damages.—The measure of damages is usually compensatory.⁶ In the case of actionable discomfort the annoyance or injury suffered by a sick person or a person in delicate health may also be taken into account in assessing damages,⁷ though by itself it will not be a sufficient cause of action. Similarly in an action for obstruction of light for windows which had been reconstructed and only partially coincided with ancient lights, the court awarded compensation in respect of the whole of the windows including the new and the ancient lights, as the injury to the new lights was a direct consequence of the wrong.⁸ In *Andreae v. Selfridge & Co.*⁹ where on account of dust, grit and noise due to building operations the plaintiff complained of loss of her business in her hotel, the Court of Appeal awarded damages for that portion of her loss which could be attributed to the illegal or excessive part of the defendants' operations. In computing damages for future loss or damage, the following cases may arise :

(a) A complete cause of action already accrued, *e.g.*, building a wall and obstructing light or air. In this case damages would represent past and future loss resulting from the injury, *e.g.*, depreciation of property, loss of present use and any future use to which the rooms deprived of light may be put.¹⁰ In an action for damages for subsidence of the plaintiff's land due to the defendant's excavation for minerals, the plaintiff cannot claim compensation for depreciation due to the risk of future subsidence.¹¹ That is not a natural consequence of the past subsidence and

1. Local Govt. Act, 1881, s. 11 (1); Public Health Act, 1875, s. 94; Public Health Act, 1936, s. 93. In India, see *e.g.*, the Madras City Municipal Act (IV of 1919), ss 222, 258 to 277; *Ali Mahomed v. Municipal Commissioners of Bombay*, (1924) 27 Bom.L.R. 581; 1925 Bom. 458 (as to powers of abatement under Bom. Municipal Act).

2. S. 36.

3. S. 24.

4. *Narasimhulu v. Nagur Sahib*, (1933) I.L.R. 57 Mad. 351; 66 M.L.J. 31.

5. *E. v. Rajkumar*, (1878) I.L.R. 3 Cal. 573; *Chunder v. Koylash*, (1880) I.L.R. 7 Cal. 665.

6. As to exemplary damages, see *Bell v. Midland Ry. Co.*, (1861) 10 C.B.N.S. 287, at p. 308. 7. *Spruzzon v. Dorsett*, (1896) 12 T.L.R. 246.

8. *In re London, Tilbury and Southend Ry. Co.*, (1889) 24 Q.B.D. 326.

9. (1937) 3 A.E.R. 255; (1938) 1 Ch. 1; above, paras. 40 and 45.

10. *Moore v. Hall*, (1878) 3 Q.B.D. 178, 183; *Griffith v. Richard Clay & Sons*, (1912) 2 Ch. 291; *Wills v. May*, (1923) 1 Ch. 317.

11. *Westleigh Colliery Co. v. Tunnicliffe*, (1908) A.C. 27.

a cause of action in respect of future subsidence arises only on its occurrence.

(b) A continuing cause of action,¹ e.g., pollution of a stream by discharge of sewage from a town or refuse of a factory,² causing offensive smells or noise. In such cases repeated actions may be brought and damages in any one of them will represent the loss sustained up to the date of decree or assessment,³ and not future loss after decree which being contingent on the continuance of the wrong must be the subject of a later action.⁴ The proper course in such cases is to sue for an injunction.

(c) Apprehended or threatened injury.—In this case no damages can be claimed as no damage has been sustained. But when the plaintiff asks for an injunction, the court has a discretion to grant damages instead, which will then represent all future loss.⁵

92. Injunction.—This is a remedy which is peculiarly appropriate in the case of nuisances and other continuing wrongs. Formerly in England, it was available only in the equity courts.⁶ The common law courts could only award damages for the injury already caused by a nuisance. After the fusion of these courts by the Judicature Act, it may be granted by any judge of the High Court in England, whether in the King's Bench or in the Chancery Division. That Act vested in the High Court a wide discretion to grant an injunction when it appears to the court 'just and convenient' but did not alter the principles on which the discretion was exercised by the old equity courts.⁷ These principles are substantially embodied in the Specific Relief Act in India.⁸ They are stated in the following paragraphs.

93. Injunction is the normal remedy.—On proof of a nuisance existing or threatened, the plaintiff is ordinarily entitled to an injunction,

1. *Hole v. Chard*, (1894) 1 Ch. 293 where the phrase is defined.

2. *Pennington v. Brinsop*, (1877) 5 Ch. D. 769 at 773, *per* Fry, J.

3. R.S.C., O. 36, r. 58.

4. *Battisill v. Reed*, (1856) 18 C.B. 696; *Wood v. Conway Corporation*, (1914) 2 Ch. 47 at 57. But damage upto removal of injunction may be given; *Basil v. Corporation of Calcutta*, I.L.R. (1940) 2 Cal. 131; 1941 Cal. 207.

5. *Leeds Industrial Co-operative Society v. Slack*, (1924) A.C. 851.

6. Before the passing of Rolt's Act (25 & 26 Vict. c. 42) they could not issue an injunction till the existence of the nuisance had been determined by a court of law. That Act gave the power to try questions of fact and law in such cases.

7. *Gaskin v. Balls*, (1879) 13 Ch. D. 324.

8. Ss. 54, 56; see *Shamnugger Jute Co. v. Ram Narain*, (1886) I.L.R. 14 Cal. 189, 199; *Callianji v. Narsi*, (1894) I.L.R. 18 Bom. 702; *Chaturbhuj v. Mansukhram*, (1924) 27 Bom. L.R. 73; 1925 Bom. 183; *contra*, see *Mahmed Anzam v. Jaganath*, (1925) I.L.R. 3 Rang. 230; see also *Dawson v. Princess Rounak*, (1928) I.L.R. 6 Rang. 456; *Poosundong Basaar Co. v. Ellerman's Arracan Rice etc. Co.*, (1934) I.L.R. 12 Rang. 200; 1933 Rang. 351.

unless he is guilty of some improper conduct, laches or acquiescence.¹ The reason is that damages are ordinarily an inadequate relief and that the plaintiff would otherwise be compelled to bring successive actions for damages for a continuing injury. This is the settled rule in England² and in India.³ An injunction is preventive when it forbids a nuisance that is threatened. Where, however, the defendant has abandoned his intention of causing the nuisance, an injunction is unnecessary.⁴ Where the action is only to test the defendant's right, a declaration and nominal damages would suffice.⁵ An injunction is mandatory when it directs the removal of a nuisance that has already come into existence, *e.g.*, a building obstructing the plaintiff's ancient lights or a factory sending offensive noises or smells. This is generally a strong measure to adopt and will be denied where the

1. *Martin v. Price*, (1894) 1 Ch. 276 (light); *Shelfer v. City of London Electric Lighting Co.*, (1895) 1 Ch. 287; *Jordeson v. Sutton*, (1899) 2 Ch. 217; *Wood v. Conway Corporation*, (1914) 2 Ch. 47 (fumes); *Stollmeyer v. Trinidad Lake Petroleum Co.*, (1918) A.C. 485 (pollution of water).

2. This rule prevailed in the old equity courts which originally could only award an injunction. They got the power to award damages in addition to or in substitution for an injunction, by Lord Cairns's Act, 1885, 21 & 22 Vict. c. 27, s. 2, which did not however alter the old rule; *Shelfer v. City of London Electric Lighting Co.*, (1895) 1 Ch. 287.

3. Light: *Ramanjulu v. Apparanji Ammal*, (1911) 1 M.W.N. 251 : 9 I.C. 417; *Muthukrishna Iyer v. Somalingamuni*, (1912) I.L.R. 36 Mad. 11 : 21 M.L.J. 742; *Ammami v. Ranganayaki*, (1925) 51 M.L.J. 304 : 1926 Mad. 898; *Kristo v. Nanda*, (1908) I.L.R. 35 Cal. 851; *Jotindra v. Probodh*, (1931) 35 C.W.N. 963 : 1932 C. 249; *Chota Lal v. Lalubai*, (1904) I.L.R. 29 Bom. 157 : 6 Bom.L.R. 633; *Bai Kashibai v. Purushottam*, (1923) 25 Bom. L.R. 239 : 1923 Bom. 196; *Gajadhar v. Kishore*, (1915) 13 A.L.J. 385 : 28 I.C. 969; *Thakurdas v. Abdul*, (1920) 2 Lah.L.J. 701; *Jawahar v. Seva*, (1923) 5 Lah. L.J. 487 : 1924 Lah. 97; see, however, *Poosundung Basaar Co. v. Ellerman Arracan Rice & Co.*, (1934) I.L.R. 12 Rang. 200 : 1933 Rang. 351; rights in water : *Ponnusami Tevar v. Collector of Madura*, (1869) 5 M.H.C. 6; *Kristna Ayyan v. Venkatachella*, (1872) 7 M.H.C. 60; *Buchi Venkata v. Suri Venkata*, 1929 Mad. 25; *Basavana Gowd v. Narayana*, (1930) I.L.R. 54 Mad. 793 : 61 M.L.J. 563; *Bali Ram v. Bela Singh*, 1923 Lah. 594; *Ma Shwe v. Maung Shwe*, 1927 Rang. 171; water from eaves : *Nasarbhoi v. Munshi*, (1891) I.L.R. 16 Bom. 533; *Banomoli v. Mokundalai*, (1912) 23 I.C. 959 (Cal.); noise : *Khagendra v. Bhupendra*, (1910) I.L.R. 38 Cal. 296 : 15 C.W.N. 316; *Land Mortgage Bank of India v. Ahmedbhoy*, (1883) I.L.R. 8 Bom. 35; *Hulas Rai v. Sohan Lal*, 1923 All. 443; smell : *Sayad v. Sayad*, (1888) I.L.R. 12 Bom. 634; *Galstaun v. Doonia Lal*, (1905) I.L.R. 32 Cal. 697; 9 C. W. N. 612; *Rangoon Municipal Committee v. Burma Ry. Co.*, (1919) 59 I.C. 823 (Bur.); *Amerendra v. Baranagore Jute Factory*, (1922) I.L.R. 49 Cal. 1059; *Anandarao v. Municipal Council, Nagpur*, 1926 Nag. 50; as to form of injunction, see *Chiragh v. Karim*, (1918) 64 I.C. 169 (Lah.); for a case of a combined decree for damages and injunction, see *Land Mortgage Bank of India v. Ahmedbhoy*, (1883) I.L.R. 8 Bom. 35; for form of injunction in case of light, see *Collis' case*, (1904) A.C. 193; *Anderson v. Francis*, (1906) W. N. 160; *Higgins v. Betts*, (1905) 2 Ch. 210, 217; *Andrews v. Waite*, (1907) 2 Ch. 510; in India, C.P.C. Appx. D; *Bai Kashibai v. Purushottam*, 25 Bom. L.R. 239; 1923 Bom. 196; for a case of diversion by a dam, see *Sethkuramalinga v. Ananda*, (1934) 67 M.L.J. 373; 1934 Mad. 583. See also the cases noted in para. 40 above.

4. *A. G. v. Dorin*, (1912) 1 Ch. 378.

5. *Bowes v. Law*, (1870) 39 L.J. Ch. 483; *Smith v. Baxter*, (1900) 2 Ch. 138, 145; *Higgins v. Betts*, (1905) 2 Ch. 210.

plaintiff has been guilty of laches, delay¹ or any improper conduct.² When granting an injunction for removing a nuisance the court may award damages for the injury or loss already suffered down to the date of the decree or assessment.³ The court has also power to issue an interlocutory or temporary injunction pending an action in cases of urgency.⁴

94. **Power to award damages in lieu of injunction.**—The court may in its discretion decline to grant an injunction and will only award damages, if it would be oppressive to grant it by reason of the injury being small and of other circumstances in the case.⁵ Whether an injury is small depends on the facts.⁶ The amount of pecuniary damages which could be awarded is not the sole criterion of smallness.⁷ For instance, as between the owners of two small houses either of them is entitled to have his lights protected from obstruction by the other though the pecuniary value of the easement may be a small figure.⁸ Of course any trifling damage does not call for an injunction.⁹ The application of the rule in cases of light is beset with peculiar difficulties and conflicting considerations of policy. A poor man has a right to live in his house with his lights undisturbed by his rich neighbour and cannot be compelled to part with them in favour of the latter for a sum of money which he does not want and cannot fix.¹⁰ On the other hand an injunction may be a means of extortion and oppressive in

1. *Benode Coomaree v. Soudaminee*, (1889) I.L.R. 16 Cal. 252; *Ulagappan v. Chidambaram*, (1906) I.L.R. 29 Mad. 497; *Bhimati v. Yeswant*, (1929) 31 Bom. L.R. 771; 1929 Bom. 388; *Mahomed v. Jaganath*, (1925) I.L.R. 3 Rang. 230; *Rochdale Canal Co. v. King*, (1851) 22 L.J. Ch. 606; *A. G. v. Leeds Corporation*, (1870) L.R. 5 Ch. 583; *Jones v. Llanrwst*, (1911) 1 Ch. 411.

2. *Marker v. Marker*, (1851) 20 L. J. Ch. 251; for a case where an injunction was refused as the plaintiff bought his land only to make the defendant pay a heavy price for it, see *Edwards v. The Allouez Mining Co.*, (1878) 31 Am. R. 301, 304 "wherever one keeps within the limits of lawful action, he is certainly entitled to the protection of the law, whether his motives are commendable or not; but if he demands more than the strict rules of law can give him, his motives may become important," *per* Cooley, J.

3. *Gilling v. Gray*, (1910) 27 T.L.R. 39.

4. C. P. C., O. 39, r. 2; even a temporary injunction; *Kandaswami v. Subramania*, (1917) I.L.R. 41 Mad. 208.

5. *Shelfer v. City of London Electric Lighting Co.*, (1895) 1 Ch. 287, at 322 *per* Smith, L.J.; see also Specific Relief Act, s. 56, sub-clauses (g) to (j); *Dawson v. Princess Rounak*, (1928) 1 L. R. 6 Rang. 456.

6. *E.g.*, *Petty v. Parsons*, (1914) 1 Ch. 704.

7. *Per* Lord Macnaghten in *Colls v. Home & Colonial Stores*, (1904) A.C. 179, 193.

8. See Smith, L.J. in *Shelfer v. City of London Electric Co.*, (1895) 1 Ch. 287, 322.

9. *Per* Jessel, M.R. in *Aynsley v. Glover*, (1875) L.R. 18 Eq. 544, 547.

10. *Per* Page-Wood, V. C. in *Dent v. Auction Mart Co.*, (1866) 2 Eq. 233 at 247; *per* Lord Sumner in (1924) A.C. at p. 872.

some cases.¹ Thus it was held that if the plaintiff's cottage is rendered wholly useless for residence, he is entitled to an injunction though the defendant's proposed buildings are much more valuable and the plaintiff asked for a fancy price for selling his property.² On the other hand a baker and confectioner occupying a low and ill-lighted house in a crowded part of Leeds could get only damages and not an injunction to stop a building-scheme of the defendants as the plaintiff could improve his lighting arrangements if he liked and the expense of doing so could be compensated in money.³ Though in principle the power to grant a mandatory injunction does not differ from that to grant any other form of injunction,⁴ the former may be more oppressive than the latter, especially where the plaintiff has not been sufficiently diligent.⁵ But where the defendant has committed a nuisance in defiance of the plaintiff's rights or protests or in a hurry to avoid an injunction, he cannot invoke the court's power to grant damages instead of an injunction.⁶

95. Power to award damages in lieu of injunction in cases of prospective nuisance.—The power to award damages in lieu of an injunction may be exercised both in the case of an existing and also a prospective nuisance.⁷ In such cases damages represent compensation for past as well as future damage. The result of a decree of that kind is that the plaintiff is purchased out of his right and submits for value received to a permanent nuisance.

96. Quia timet action.—In an action to prevent a threatened injury, called a *quia timet* action, the plaintiff must establish the certainty of substantial damage arising from the act contemplated by the defendant.⁸ The decision of questions of prospective damage is often a difficult matter

1. See *per* Younger, L.J. in (1923) 1 Ch. at p. 461; *Fishenden v. Higgs and Hill, Ltd.*, (1935) 153 L.T. 128.

2. *Cowper v. Laidler*, (1903) 2 Ch. 337; see also *Greenwood v. Hornsey*, (1886) 33 Ch. D. 471.

3. *Slack v. Leeds Industrial Co-operative Society*, (1923) 1 Ch. 431, on appeal, (1924) 2 Ch. 475; see also *Holland v. Worsley*, (1884) 26 Ch. D. 578; *Price v. Hilditch*, (1930) 1 Ch. 500; *Mahomed Auzam v. Jagnath*, (1925) 1 L.R. 3 Rang. 230; *Lee Paik v. Tan Kin*, 1933 Rang. 344.

4. *Smith v. Smith*, (1875) L.R. 20 Eq. at p. 504, *per* Jessel, M.R.

5. *Fishenden v. Higgs and Hill, Ltd.*, (1935) 153 L.T. 128.

6. *Daniel v. Ferguson*, (1891) 2 Ch. 27; *Shelver v. City of London Electric Lighting Co.*, (1895) 1 Ch. 287, 323.

7. *Leeds Industrial Co-operative Society v. Slack*, (1924) A.C. 851.

8. *Salvin v. North Brancepeth Coal Co.*, (1874) L.R. 9 Ch. 705; *Fletcher v. Bealey*, (1884) 28 Ch. D. 638; *Medcalf v. Strawbridge, Ltd.*, (1937) 2 K.B. 102, 111; *Amarendra v. Barangore Jute Factory*, (1922) 1 L.R. 49 Cal. 1059; *Anand Rao v. Municipal Committee of Nagpur*, 1926 Nag. 50; for a case of light, see *Litchfield-Speer v. Queen Anne's Syndicate*, (1919) 1 Ch. 407.

and may depend on expert testimony.¹ For instance in *Metropolitan Asylum District v. Hill*,² an injunction was granted against the maintenance of a small-pox hospital, on the ground of risk of infection to adjoining occupiers. In later cases of a similar kind, injunctions have been refused on the ground that medical science does not now sanction the theory of aerial infection.³ In *Salvin v. North Brancepeth Coal Co.*⁴ the plaintiff complained that fumes which escaped from the defendants' coke ovens were causing injury to his trees and shrubs. It was held that as appreciable injury had not so far arisen it was impossible to be certain that it would arise in future and that the plaintiff could not ask for an injunction to stop the works on the mere ground that scientific evidence was available to show that at some future time damage would happen.

1. For such evidence in a case of light, see *Semon & Co. v. Bradford Corporation*, (1922) 2 Ch. 737; as to advisability of calling for report of an expert, see *per Lord Macnaghten in Colls v. Home & Colonial Stores*, (1904) A.C. at p. 192. A well-known test recommended in these cases is that if lateral light would come by an angle of 45 degrees from the proposed wall or building, there is *prima facie* enough light and the plaintiff cannot complain. See *Colls' Case*, (1904) A.C. at p. 210. The test owes its origin to the Metropolis Management Act, 1862 (25 & 26 Vict. c. 102), ss. 2, 85. As to this test, see *Parker v. First Avenue Hotel*, (1883) 24 Ch. D. 282; *Chotalal v. Lallubhai*, (1904) I.L.R. 29 Bom. 157; 6 Bom. L.R. 633; *Framji v. Framji*, (1905) I.L.R. 30 Bom. 319; 7 Bom. L.R. 825; *Mussammat Chand v. Narain*, 1923 All. 542.

2. (1881) L.R. 6 A.C. 193; see also *Bendelow v. Guardians of Wortley Union*, (1887) 57 L.J. Ch. 762; *cf. Bramwell v. Lacy*, (1879) 10 Ch. D. 691.

3. *A. G. v. Nottingham*, (1904) 1 Ch. 673; *A.G. v. Rathmines Hospital Board*, (1904) 1 Ir. R. 161; *A.G. v. Manchester*, (1893) 2 Ch. 87; *Withington Local Board of Health v. Manchester*, (1893) 2 Ch. 19; as to a hospital for surgical tuberculosis, see *Frost v. King Edward VII Welsh &c. Association*, (1918) 2 Ch. 180. In *Fleet v. Metropolitan Asylum Board*, (1886) 2 T.L.R. 361, 363, Bowen, L.J. made some interesting remarks on the duty of courts who decide scientific questions; *cf.* the remarks of Beaman, J. about expert evidence in *Bhai Bhicaji v. Perojshaw*, (1915) I.L.R. 40 Bom. 401, 413.

4. (1874) L.R. 9 Ch. 705; see the well-known observations of James, L.J. about proof of future damage by scientific evidence.

CHAPTER VII.

DEFAMATION.

1. **Defamation as a tort.**—From very early times the law has sought to protect the individual in his reputation as in his person and property.¹ An injury to reputation is as likely, if not more, to disturb public peace and individual comfort and happiness as an injury to person or property.² Till comparatively modern times, the practice of waging a duel for vindicating one's honour and good name was prevalent in England and other countries in Europe. The mode of protecting reputation has varied in the laws of different times and countries. The ancient Hindu law punished the defamer but did not compensate the defamed.³ The Roman⁴ and the English laws have done both. In England, however, for a long time the courts of the church entertained cases of defamation⁵ and imposed spiritual penalties like penance. By the sixteenth century they had declined in influence and the King's courts had begun to allow the remedy of an action on the case for defamation. The law of defamation assumed after the invention of printing a good deal of importance which has been considerably enhanced in modern times by the great development of journalism. The invention of broadcasting by wireless has, by extending the area of dissemination of the spoken word, added to its power just as the invention of printing did in the case of the written word two centuries ago.

2. **Meaning of defamation.**—Defamation is the wrong done by a person to another's reputation by words, signs, or visible representations.⁶ It is different on the one hand, from wrongful acts which injure reputation,⁷ e.g., assault involving disgrace, unlawful arrest or attachment, malicious

1. On the history of defamation, see Veeder, *Anglo-American Essays on Legal History*, Vol. III, p. 447; Spencer Bower, *A Code of Actionable Defamation*, Appendices III and XIX; Holdsworth, Vol. III, pp. 409, 410; Vol. V, p. 205; Vol. VIII, p. 333; 40 L.Q.R. 302, 397.

2. *De Crespigny v. Wellesley*, (1829) 5 Bing. at p. 406, per Best, C. J. in *Dixon v. Holden*, (1869) L. R. 7 Eq. 488, Malins, V. C. spoke of reputation as a kind of property. Blackstone included defamation in the category of wrongs to personal security, Vol. III, p. 119.

3. Above, Chap. I, para. 24.

4. The Roman law reserved punishments for cases of libels which were 'atrox' or of a serious nature; e.g., libel on a person of rank in a public place.

5. This jurisdiction was abolished in 1885; Holdsworth, Vol. I, p. 620. Defamation of great men called *scandalum magnatum* was punished by the common law courts.

6. L. P. C., s. 499.

7. For another instance, see *Chenna Basappa v. Sankara*, (1929) 29 L. W. 604; 1929 Mad. 493, (obstruction of a religious head of a mutt going along a highway with customary honours).

prosecution, a breach of contract like a breach of promise of marriage¹ or a banker dishonouring his customer's cheque in spite of having the latter's funds in his hands,² and on the other, from words which cause damage to a person's property or business and not to his reputation, *e.g.*, injurious falsehood like slander of title or slander of goods. Defamation also differs from insult caused by words or representations. The former is a wrong done to the regard or esteem in which one is held by others while the latter is an injury only to one's dignity or self-respect. Therefore the former requires publication to a third party while insult may consist in abusing a person only in his hearing. While the former is an actionable wrong, mere insult is not actionable though where it accompanies wrongs like defamation, assault or trespass, it will be considered as an aggravating circumstance and will enhance the damages. In this respect the common law deviated from the Roman law which treated defamation, insult, assault, etc., as different types of a delict known as *injuria*.³ This peculiarity of the English law is traceable to the remedy of the action on the case in which damage was usually essential; and damage can arise only from publication to a third party and not from mere insult. The action of trespass was not available for insult by words though it was extended to cases of assault causing fear of bodily harm. In India the English rule has been followed and it has been held that mere insult apart from defamation is not actionable.⁴ Insult likely to provoke a breach of the peace is, however, a criminal offence.⁵ In the United States, an action for mere insult is allowed in certain cases; *e.g.*, carriers are held liable to passengers for the insulting conduct of their servants in the course of their employment.⁶

3. Meaning of 'libel' and 'slander'.—The word 'defamation' is the generic name for the wrong; 'libel' and 'slander' are particular forms

1. *Berry v. Da Costa*, (1866) L. R. 1 C. P. 331. Wrongful dismissal from service may also involve a slur on character for which, however, damages cannot be claimed; *Addis v. Gramophone Company*, (1909) A. C. 488; *Secretary of State for India v. D'Attaires*, (1934) I. L. R. 12 Rang. 556.

2. *Marzetti v. Williams*, (1830) 1 B. & Ad. 415; *Rotin v. Steward*, (1854) 14 C. B. 595; *Fleming v. Bank of New Zealand*, (1900) A. C. 577; above, Chap. I, para. 15; but words accompanying the act of dishonour may be defamatory: *Allen v. London County and Westminster Bank*, (1915) 84 L. J. K. B. 1286; cf. *Frost v. London Joint Stock Bank*, (1906) 22 T. L. R. 760; *Flach v. London and S. W. Bank*, (1915) 84 L. J. K. B. 334. As to measure of damages on a claim for breach of contract in such cases, see *Gibbons v. Westminster Bank*, (1939) 2 K. B. 882.

3. As to the meanings of this term in different contexts, see Sandars, *Institutes of Justinian*, Lib. IV. Tit. 4; above, Chap. I, para. 22.

4. *Girish Chunder v. Jatadhari*, (1899) I.L.R. 26 Cal. 653; *Suraj Narain v. Sita Ram*, 1939 All. 461 (abusive words held actionable).

5. S. 502, I.P.C.

6. Restatement, Vol. I, § 48. See also 49 Har. L.R. 1050, 1052, as to liability of other public utility services.

of it.¹ Libel² is the name given to defamatory statements or representations in writing or otherwise recorded, *e.g.*, by printing, typing, lithography, or raised letters for the use of the blind, picture, photograph, cinema film, caricature, statue, effigy, wax model, or other physical symbol like fixing up a gallows in front of a person's house. Slander³ denotes defamatory statements or representations which are expressed by speech or its equivalents, *e.g.*, a nod, wink, shake of the head, smile,⁴ hissing, the finger-language of the deaf and dumb. Libel has generally more permanence than slander, though its permanence may be very little as in the case of sky-writing. Libel had formerly a larger area of dissemination, especially after the invention of printing; but another invention, *viz.*, the radio,⁵ has reversed the position. It has been suggested that libel is addressed to the eye and slander to the ear; but the finger-language of the deaf and dumb is slander and the reproduction of speech by a gramophone record⁶ or a talking cinema film⁷ is the publication of a libel.

4. **Distinction between libel and slander in the English law.**—In England there is an important distinction between libel and slander both in the sphere of the criminal law and in the law of torts. Libel is a criminal offence; but slander is not, except in certain cases, *viz.*, where the slanderous words are blasphemous,⁸ seditious,⁹ obscene,¹⁰ or amount to a

1. As to the etymology and history of these terms, see Spencer Bower, Appx. I, p. 261.

2. The word is also used sometimes to refer to the act of publishing libellous matter.

3. The word was used in older judgments and statutes in the wider sense; *e.g.*, in *Clement v. Chivis*, (1829) 9 B. & C. at p. 174, Bayley, J., spoke of oral and written slander. The phrase 'slander of title and of goods' includes oral and written statements even now.

4. *Per* Lord Campbell in *Walters v. Morgan*, (1861) 3 De. G. F. & J. 718.

5. An extemporaneous speech by wireless is slander; even reading from a script was so held in an Australian case as to which see 51 L.Q.R. 573. See, however, Draft Restatement No. 12, s. 1011; also (1936) 82 L.J. 250. For a case of slander by broadcast on the wireless, see *Bergman v. Macadam*, (1941) 191 L.T. (Jour.) p. 131 where the C.A. upheld the plea of fair comment and dismissed the action. As to liability of a person who makes the words audible through a receiving set and loud speaker in his premises, see *Performing Right Society, Ltd. v. Hammond's Bradford Brewery Co., Ltd.*, (1934) 1 K.B. 121; *Performing Right Society, Ltd. v. Camelo*, (1936) 3 A.E.R. 587. Dictation to a stenographer is slander, *Osborne v. Thomas Boulter & Son*, (1930) 2 K.B. 226, *per* Scrutton and Slesser, L. JJ., Greer, L.J., *contra*. See also 43 Har. L.R. 838; even if the stenographer reads it out, it is slander; (1930) 2 K.B. at p. 231, *per* Scrutton, L.J.

6. See however, 51 L.Q.R. 282, 573; Winfield, Law of Torts, p. 260.

7. *Yousoupoff v. Metro-Goldwyn-Mayer Pictures*, (1934) 50 T.L.R. 581.

8. *R. v. Williams*, (1797) 26 How St. Tr. 656; *R. v. Carlile*, (1819) 3 B. & Ald. (161); *R. v. Barracough*, (1906) 1 K.B. 201.

9. 60 Geo. 3 & 1, Geo. 4 c. 1.

10. *R. v. John Wilkes*, (1768) 4 Burr. 2527; *R. v. Carlile*, (1845) 1 Cox.C.C. 229; *R. v. Hicklin*, (1868) L.R. 3 Q.B. 360.

contempt of court¹ or a solicitation to commit a crime.² Libel is actionable *per se*, that is, by mere publication of it and without proof of damage; slander is not actionable except on proof of special damage, unless it falls within certain categories defined by decisions.

5. **Indian law regarding libel and slander.**—In India both libel and slander are criminal offences.³ As regards the civil remedy of damages, courts in India have long been agreed that in cases arising outside the cities of Calcutta, Madras and Bombay, the peculiar distinction of the English law is not applicable and an action for slander as well as for libel lies without proof of special damage.⁴ In cases arising in those cities, the view has prevailed that the English law as it prevailed in 1726 would apply. The Calcutta High Court⁵ accordingly held that an action for an oral imputation of unchastity to a woman would not lie without special damage, though in such cases the common law rule has been abrogated in England by a statute of 1891.⁶ But the Bombay⁷ and the Madras High Courts⁸ have upheld the contrary and, it is submitted, the better view, and allowed similar actions without proof of special damage. This view proceeds on the grounds, first, that in these cities the High Courts in their original jurisdiction are bound under the Charters constituting them only to administer 'justice and right' and the English common law as such has not been introduced, and second, that in any case the common law has to be applied only in so far as circumstances permit and that the rule as to slander cannot be applied in these cities as it would produce anomalous results by reason of the fact that a different rule prevails in the mofussil.⁹ Besides, as adultery is a crime in India, an imputation of it is actionable *per se* even if the strict rule of the English law were applied. A married

1. *R. v. Read and Huggonson*, (1742) 2 Atk. 469; *R. v. White*, (1808) 30 St. Tr. 1131; *R. v. Fisher*, (1811) 2 Camp. 563; *R. v. Tibbitts*, (1902) 1 K.B. 77.

2. *R. v. Higgins*, (1801) 2 East. 5.

3. I.P.C., s. 499.

4. Madras.—*Parvathi v. Mannar*, (1884) I. L. R. 8 Mad. 175; *Leslie Rogers v. Hafee Fakir Mahomed*, (1918) I. L. R. 42 Mad. 132, 135: 35 M. L. J. 673. Allahabad.—*Dawan Singh v. Muhip Singh*, (1888) I. L. R. 10 All. 425; *Rahim Baksh v. Bachammal*, (1929) I.L.R. 51 All. 509. Calcutta.—*Sukhan v. Bipad*, (1906) I.L.R. 34 Cal. 48; *Shobhagee v. Bokori*, (1906) 4 C. L. J. 390. Bombay.—*Kashiram v. Bhadu*, (1870) 7 Bom. H. C. (A. C.) 17. Oudh.—*Gaya Din v. Mahabir*, I. L. R. 1 Luck. 386; 1926 Oudh 363. Sind.—*Muridar v. Naraindas*, 1929 Sind 172. Burma.—*Ma Win v. Ma Ngon*, 1923 Rang. 77. Cf. Indian Limitation Act, art. 25.

5. *Bhooni Money v. Natobar*, (1901) I. L. R. 28 Cal. 452: 5 C. W. N. 659.

6. 54 and 55 Vict. c. 51. The rule had been condemned in such cases; "unsatisfactory" and "barbarous", *per* Lords Campbell and Brougham in *Lynch v. Knight*, (1861) 9 H. L. C. 577; see also *Alexander v. Jenkins*, (1891) 2 Q. B. at 801; *Jones v. Jones*, (1916) 2 A. C. at p. 489.

7. *Hirabai v. Edulji*, (1926) I. L. R. 51 Bom. 167. See *Mitha Rustomji v. Nusserwanji*, 1941 Bom. 278, 285.

8. *Narayanasah v. Kannamma*, (1931) I. L. R. 55 Mad. 727: 62 M. L. J. 608; above, Chap. I, para. 25.

9. *Per* Beasley, C. J. in I. L. R. 55 Mad. at p. 736.

woman cannot be punished for the offence but is not on that ground to be disabled from suing, because otherwise there would be the absurdity that a man can sue for such an imputation, but a woman cannot.¹

6. Rules regarding slander in England.—Under the common law slander is not actionable unless the plaintiff proves special damage to have resulted as a direct consequence. To this requirement of special damage there are certain exceptions :

(i) where the words charge the plaintiff with the commission of a crime ;

(ii) where they impute a contagious disease to the plaintiff tending to exclude him from society ;

(iii) where the words are spoken of him in relation to his office, profession or trade, provided that (a) the office, profession or trade is held by him at the time of the slander, and (b) if it is an office of honour merely and not of profit, the words charge him with dishonesty or other misconduct therein.

By the Slander of Women Act, 1891,² oral imputations of unchastity or adultery to a woman or girl have been made actionable without proof of special damage. In mediaeval England, there were certain statutes which punished slanders affecting magnates or the great men of the realm like peers, judges and other high officers of state. These were known as the statutes of *Scandalum Magnatum*.³ Under these statutes a civil remedy was also available though it was rarely used.⁴ They became obsolete in course of time⁵ and were repealed formally in 1887.⁶

A discussion of the above rules is now of little practical interest in India and is relegated to an appendix to this Chapter. It is enough to say here that the restrictions imposed by them on the actionability of slander as distinguished from libel are due to historical causes and are at the present day irrational.⁷ But the fear of undesirable litigation has so far

1. *Per Kemp, J.* in *I. L. R.* 51 Bom. at pp. 191, 192.

2. 54 and 55 Vict. c. 51. This was a result of the decision in *Speight v. Gosnay*, (1891) 7 T. L. R. 239.

3. They were three; 3 Ed. I. c. 34 (1275); 2 Rich. II, c. 5 (1379); 12 Rich. II, c. II (1389).

4. The first instance of a civil action was *Townsend v. Hughes*, (1676) 10 Rep. 75. The last was in 1710.

5. Their purpose was served in the 16th century by the activities of the Court of Star Chamber which punished libels on high personages.

6. By the Statute Law Revision Act, 50 and 51 Vict. c. 59.

7. Below, Appx., para. 4. See *Thorley v. Lord Kerry*, (1812) 4 Taunt. 355, *per Mansfield, C. J.* In 1843 a committee of the H. L. recommended the abolition of these restrictions. The rule has no counterpart in the laws of the continent based on the Roman law. It has however been adopted in the U. S. A.

prevented any change in the law. Parliament intervened in 1891 to protect women from slander about their chastity; but in other respects it left the law of slander intact. It is also not without significance that the abolition of these restrictions is not among the reforms which have been referred to the Law Revision Committee for consideration. Indeed a conference of Empire journalists who met in London in 1935 demanded legislation in the opposite direction by assimilating the law of libel to that of slander.¹ In that way they desired to protect newspapers from libel actions resulting, as they often do at present, in large verdicts in favour of persons who have sustained no pecuniary loss. On the other hand a reform of the law as to slander, by wireless broadcasting has been suggested so that it may be treated like libel on account of its large area of dissemination.²

7. Points to be proved in an action for defamation.—In an action for defamation the plaintiff should prove :

- (a) a defamatory statement or representation concerning him, and
- (b) publication of it by the defendant to a third person or persons.

On proof of these facts the plaintiff makes out his case. It is then for the defendant to establish one of the defences recognised by law.

8. Defamatory statement or representation.—A statement or representation is defamatory when it has a tendency to injure a person's reputation. The usual definition adopted in English text-books and judgments is that a defamatory statement is one which "exposes a person to contempt, hatred or ridicule, or tends to injure him in his profession or trade, or causes him to be shunned or avoided by his neighbours."³ In *Sim v. Stretch*,⁴ Lord Atkin preferred the test: "Would the words tend to lower the plaintiff in the estimation of right-thinking members of society generally?" The following definition in the Indian Penal Code⁵ attempts a detailed explanation.

"No imputation is said to harm a person's reputation, unless that imputation directly or indirectly, in the estimation of others, lowers the moral or intellectual character of that person, or lowers the character of that person in respect of his caste or of his calling, or lowers the credit of that person, or causes it to be believed that the body of that person is in a loathsome state, or in a state generally considered as disgraceful"

1. (1936) 81 L. J. 412, below, para. 83.

2. (1936) 132 L. T. 250. See also 50 Har. L. R. 729, 730.

3. Odgers, *Libel and Slander*, p. 16; Gatlley, *Libel and Slander*, p. 14; *per* Parke B. in *Parmiter v. Coupland*, (1840) 6 M. & W. 105; and *per* Lord Blackburn, in *Capital and Counties Bank v. Henty*, (1882) 7 A. C. 741; *Mitha Rustomji v. Nusserwanji*, 1941 Bom. 278.

4. (1936) 2 A. E. R. 1237, 1240; below, para. 16. See also *Tournier v. National Provincial Bank*, (1924) 1 K. B. 461, 486-7.

5. S. 499.

Thus the term 'defamatory' which in ordinary speech usually involves some disparagement of moral or intellectual character is used in law in a slightly wider sense. Words which impute some disease like lunacy¹ or leprosy, or some caste offence in India like foreign travel or widow marriage among the higher castes,² or disparage a man's personal appearance,³ are defamatory in law though they do not touch his character. To say of a woman that she was ravished does not suggest any moral turpitude but is still defamatory.⁴ Words which do not disparage a person's reputation but merely annoy him are not defamatory, *e.g.*, a false report in a newspaper that he is dead.⁵ Similarly words which do not disparage reputation but cause pecuniary loss are not defamatory, but may be actionable as injurious falsehood, *e.g.*, a false statement that a person has retired from business.⁶ The disparagement may be in respect of his professional, artistic, literary, commercial or official reputation or the opinion held of his intelligence, character, status, credit or qualifications.⁷

9. Standard of opinion.—The standard of opinion is that which prevails among ordinary, reasonable people of the time and place,⁸ and not the opinion which prevailed in another time, or in another country, or among a special class or abnormally constituted people. For instance, to refuse to fight a duel would at one time have been considered disgraceful in England but it is not so now; an imputation to that effect may not be now treated as defamatory. Many sports and practices though respectable in times past as bull-baiting, cock-fighting, pigeon-shooting are no longer

1. *R. v. Harvey*, (1823) 3 B. & C. 257, *per* Abbot, C. J.; *Morgan v. Lingen*, (1863) 8 L. T. N. S. 800; *Hodson v. Pare*, (1899) 1 Q. B. 455.

2. *E. v. Vidya Sankara*, (1883) 1 L. R. 6 Mad. 381; *Vengala Venkayya v. Venkataramiah*, (1914) 28 M. L. J. 585; 26 I. C. 460; *Govind Das v. Bishamber*, (1917) 1 L. R. 39 All. 561 (P. C.); 44 I. A. 192. 3. *Cook v. Ward*, (1830) 6 Bing. 409.

4. *Yousouppoff v. Metro-Goldwyn-Mayer Pictures, Ltd.*, (1934) 50 T. L. R. 581.

5. *Cohen v. New York Times Co.*, (1912) 153 N. Y. App. Div. 242; cited in *Gatley*, p. 32; see also *Emerson v. Grimsby Times and Telegraph Co., Ltd.*, (1926) 42 T. L. R. 238 where it was held not libellous to publish an account of a man's wedding on the day before it took place with the result that he was subject to ridicule by friends who knew the mistake.

6. Below, Chap. X, para. 2. An erroneous report in a newspaper that a barrister has applied for silk may be of this category as in the case of a junior barrister it would injure his practice; 173 L. T. 187.

7. As to whether calling a vakil sophistical in his argument is defamatory, see *Naganatha v. Subramania*, (1917) 32 M. L. J. 392; 40 I. C. 126, as to calling a person ungrateful or ingrate, see *Cox v. Lee*, (1869) 4 Ex. 284; *Burke v. Skipp*, (1923) 45 M. L. J. 754; 1924 Mad. 340; suggesting an actress, 28 years of age, to be ten years older, held a libel on her professional reputation, *Chattell v. Daily Mail Publishing Co.*, (1900) 18 T. L. R. 165.

8. *Holdsworth Ltd. v. Associated Newspapers Ltd.*, (1937) 3 A. E. R. 872, 876, 880. Therefore old precedents are not always reliable guides; see *Harrison v. Thornborough*, (1714) 10 Mod. 195.

so regarded¹; a false imputation that a person engages in them may now be regarded as injurious to reputation. Falsely to call a person 'German' was in England defamatory during the last war² and probably would be so also during the present but not at other times. In England to suggest of a person that he married a widow would not be defamatory. But in India, with reference to a member of the higher castes, it would be defamatory as tending to his exclusion from caste.³ With the relaxation of the rigour of caste in recent times, breaches of its rules, like foreign travel or interdining between members of different castes or communities, do not now involve loss of caste amenities as they did formerly.⁴ It is therefore doubtful if the imputation of such conduct would be now regarded as defamatory. Sometimes statements may offend special or conventional views of conduct or character but may not be defamatory. For instance in an Irish case,⁵ it was held that it was not defamatory to say of a person that he endeavoured to suppress dissension and discourage sedition in Ireland, for though such words might injure him in the minds of criminals and rebels, they would not tend to lower him in the estimation of right-thinking men. Similarly it was held in another case⁶ that it was not defamatory to say of the plaintiff, a working stone-mason, that "he was the ring-leader of the nine hours' system," though that might cause him to be looked upon with disfavour and suspicion by certain employers who disliked the agitation for that system. Lord Coleridge, C.J., said that the statement, though false and malicious, would not be defamatory merely because the plaintiff might probably suffer damage under certain circumstances and at the hands of some persons. It was held in another case that it was not defamatory to say of a physician that he had met homeopaths in consultation.⁷ In the course of the argument in that case, Pollock, C. B., remarked that it was not libellous, for instance, to write of a lady of fashion that she had been seen going in an omnibus though that might have been unconventional conduct and bring her down in the eyes of fashionable society. To say of a workman and a member of a trade union that during a dock-strike he had been to the docks and asked for work suggested trickery and disloyalty, and

1. See *Thelluson v. Valentia*, (1906) 1 Ch. 480 at p. 488; see Spencer-Bower, pp. 256, 257.

2. *Slesenger v. Gibbs & Co.*, (1916) 33 T. L. R. 35; *Roff v. British & French Manufacturing Co.*, (1918) 2 K. B. 677. As to the words 'Bolshevist' or 'Communist', see *Burns v. Associated Newspapers, Ltd.*, (1925) 42 T. L. R. 37. Cf. *Christenson v. Castor*, (1917) 41 I. C. 696 (Bur.) (to call a European a native, not defamatory).

3. *E. v. Vidya Sankara*, (1883) 1 L. R. 6 Mad. 381; *Vengala Venkayya v. Venkataramlah*, (1914) 28 M. L. J. 58; 26 I. C. 460.

4. *Govind Das v. Bishambhar*, (1917) 1 L. R. 39 All. 561 (P. C.); 44 I. A. 192; *Coopoorwami v. Duraisami*, (1909) 1 L. R. 33 Mad. 67; 19 M. L. J. 714.

5. *Mawe v. Pigott*, (1869) 4 Ir. C.L. 54.

6. *Miller v. David*, (1874) L.R. 9 C.P. 118.

7. *Clay v. Roberts*, (1863) 9 Jur. N.S. 580; see Gatlley, pp. 16, 22.

was defamatory ; but to say of him that he had left his union or openly acted against its wishes or orders not to work may not be defamatory as he is thereby only charged with independence and courage.¹ When a conflict of this kind arises between different points of view, the judge has to decide what is, or ought to be the view of right-thinking men. Thus in *Byrne v. Deane*,² the plaintiff complained that he, a member of a club, was represented by a few lines of doggerel verse put up on the walls of the club, as having informed the police of the use of a gambling machine in the club. It was held by the Court of Appeal that the words were not defamatory as it was not improper to inform the police of an offence, though it may be considered disloyal to the members of the club. The Court of Appeal held in a recent case³ that to call a man a Jew-hater was defamatory. "To say that a man hates a particular race or class of people is to allege at the very least, a character which is warped and unlikely to be impartial."⁴

10. **Defamation of a corporation.**—The reputation of a natural person differs from that of a corporation or body of persons. A joint stock company cannot be accused of murder or immorality and cannot sue for any such imputation.⁵ But it can complain of words in disparagement of its corporate property, business or reputation. For instance in the case of *South Hetton Coal Co., Ltd. v. North Eastern News Association*,⁶ it was held that it was libellous to say of a colliery company that the houses let by them to their workmen were highly insanitary and unfit for habitation as the statement would lead people of ordinary sense to suppose that the company conducted its business badly and inefficiently. In *Mayor of Manchester v. Williams*,⁷ it was held that a municipal corporation could not sue in respect of a statement which imputed corruption and bribery to some of its departments and that the proper persons to sue were the persons concerned. This decision is really not inconsistent with the rule above suggested, as the statement in question did not affect any corporate business or reputation. But if it did as where a trading company is alleged to be insolvent⁸ or to consist of alien enemies in its directorate⁹ or to be in the practice of holding forth false hopes to the public,¹⁰ or

1. *Myroft v. Sleight*, (1921) 90 L.J.K.B. 883, *per* McCordie, J.; see also *Leatham v. Rank*, (1912) 57 Sol. Jour. 111.

2. (1937) 1 K.B. 818; (Slesser and Greene, L.J.J., Greer, L.J. diss.).

3. *De Stempel v. Dunkels*, (1938) 1 A.E.R. 238.

4. (1938) 1 A.E.R. at p. 259, *per* Scott, L.J. See case noted in (1941) 55 Har. L.R. 298 (statement by a newspaper about plaintiff, congressman that he opposed appointment of a judge on the ground of the latter being a Jew and foreigner, held defamatory *per se*).

5. *Per* Pollock, C.B., in *Metropolitan Saloon Omnibus Co. v. Hawkins*, (1859) 4 H. & N. at p. 90.

6. (1894) 1 Q.B. 133.

7. (1891) 1 Q.B. 94.

8. See Kay, L.J., in (1894) 1 Q.B. at p. 145.

9. *Lyons & Co. v. Lipton, Ltd.*, (1914) 49 L. Jo. 542.

10. *Williams v. Beaumont*, (1833) 10 Bing. 260.

where a newspaper owned by a company is said to be corrupt and to sell its advocacy,¹ the company is entitled to sue. In a Bombay case,² an action at the instance of an insurance company was allowed in respect of a libel which suggested that the company was started and carried on by adventurers who filled their pockets at the cost of the ignorant poor. As in the case of a natural person, the business repute of a company will be judged by new standards of morality that now prevail. In *Holdsworth, Ltd. v. Associated Newspapers, Ltd.*,³ it was held that it was defamatory to say of a company that it had refused to accept an interim wages award of a joint conciliation board for the particular industry. Scott, L. J., observed that the political and social conditions of industry in Great Britain are very different from what they were in the Victorian days of industrialism and *laissez faire*, and every reasonably intelligent person in the country realised that as conciliation boards of representatives of employers and employed were intended to secure by a system of collective bargaining fair terms for both parties, loyalty to the conciliation machinery was an honourable duty of persons engaged in the industry owed to the nation at large. To say further that the managing director of the company was chairman of the conciliation board and had taken active part in formulating an employers' scheme was of course clearly libellous of him in his individual capacity. It was, however, held it was not libellous to say of the company, that on account of the said conduct of the company, members of a trade union had refused to handle its goods at certain docks, because to say that a man was coerced rightly or wrongly by a trade dispute was not to defame him.⁴ A non-trading corporation like a social club or political or professional association may be able to sue when it suffers in public esteem by attacks on its corporate life or activities, *e.g.*, where a political association is alleged to promote sedition, or a reputed social club to promote immorality.⁵

11. Defamation of unincorporated associations.—An unincorporated body of persons has no entity apart from the members constituting it; and such members alone can sue in their individual capacity.⁶

12. Test of a defamatory statement.—A statement or representation is defamatory if it conveys a defamatory meaning about the plaintiff

1. *Journal Printing Co. v. MacLean*, (1894) 25 Ontario R. 509, affirmed (1896) 28 Ontario App. R. 324 cited by Gatlley, p. 43; see also *Latimer v. Western Morning News Co.*, (1871) 25 L.T. 44.

2. *Union Benefit Guarantee Co. v. Thakorlal*, (1936) 37 Bom. L. R. 1033, 1936 Bom. 114.

3. (1937) 3 A.E.R. 872.

4. (1937) 3 A.E.R. at p. 877, *per* Slesser, L. J.

5. *Spencer Bower*, p. 244.

6. *London Association for Protection of Trade v. Greenlands*, (1916) 2 A. C. 15; *Gidney v. Anglo-Indian and Domiciled Association*, (1930) I. L. R. 8 Rang. 250.

to reasonable men placed in the position of those to whom it was published.¹ In an action for defamation the plaintiff should establish this fact. It is not enough for him to show that by some persons the statement was understood in a defamatory sense, or to refer to him.² The standard of understanding is that of the ordinary, reasonable man,³ having the intelligence, knowledge, education, experience and prejudices of the average man in the class of people to whom the words were published. "He is neither a genius nor an idiot, neither a fanatic nor a faddist, neither a walking encyclopædia nor an illiterate."⁴ "He is a fair-minded person and not one with a morbid or suspicious mind."⁵ If this test is satisfied, the defendant is not allowed to show that he did not intend to convey any injurious meaning or to refer to the plaintiff.⁶ This test though simple in appearance is often difficult to apply to concrete cases. The following rules deducible from the case-law on the subject may be helpful in applying it.

13. **First rule.**—The statement complained of must be understood in its ordinary and natural meaning,⁷ and the whole of it must be read together, and not merely particular parts of it.⁸ The 'bane' and the 'antidote' should be taken together.⁹ The context¹⁰ and the whole of the publication of which the alleged libel forms a part¹¹ and any document referred to therein¹² have to be considered. The rule of natural construction has now for nearly two centuries superseded the older practice of construing words strictly¹³ and prevails not merely here but elsewhere in the law wherever language has to be construed, *e.g.*, in a deed or a statute.¹⁴

1. *Capital and Counties Bank v. Henty*, (1887) L. R. 7 A. C. 741 at 745, *per* Lord Selborne, L. C.

2. *Nevil v. Pine Art and General Insurance Co.*, (1897) A. C. at p. 73, *per* Lord Halsbury, L. C.; see also *Capital and Counties Bank v. Henty*, 7 A. C. at p. 788, *per* Lord Watson; *Stubbs, Ltd. v. Russell*, (1913) A. C. at p. 398, *per* Lord Shaw.

3. Lord Bowen called him "the man on the Clapham omnibus," see *West v. West*, (1911) 27 T. L. R. 189, 476.

4. Spencer Bower, p. 37, note (m).

5. *Keogh v. The Incorporated Dental Hospital of Ireland*, (1910) 2 Ir. R. at p. 486, *per* Lord O'Brien, C. J.

6. *Capital and Counties Bank v. Henty*, (1887) L. R. 7 A. C. at p. 772, *per* Lord Blackburn; *Hulton v. Jones*, (1910) A. C. 22.

7. *Capital and Counties Bank v. Henty*, (1887) L. R. 7 A. C. at p. 745; *The Englishman, Ltd. v. Antonio*, (1930) 35 C. W. N. 271: 1931 Cal. 81.

8. Lord Herschell, L. C. in *Australian Newspaper Co. v. Bennett*, (1894) A. C. at p. 288.

9. *Per* Alderson, B. in *Chalmers v. Payne*, (1885) 2 Cr. M. & R. at p. 159.

10. *Per* Lord Halsbury, in (1897) A. C. at p. 72, *per* Lord Shand, at p. 78.

11. *Cooke v. Hughes*, (1824) Ry. & M. 112; *Darby v. Ouseley*, (1856) 1 H. & N. 1 at p. 11 (subsequent issues of same newspaper when matter was connected); *Dauncey v. Holloway*, (1901) 2 K. B. 441, 443.

12. *Weaver v. Lloyd*, (1824) 2 B. & C. 678; *Darby v. Ouseley*, above.

13. *Per* Lord Ellenborough, C. J. in *Roberts v. Camden*, (1807) 9 East. 93 at p. 96. Below, Appx., paras. 1 and 4.

14. *River Wear Commissioners v. Adamson* (1872) A. C. at p. 763, *per* Lord Blackburn.

14. **Second rule.**—If the statement in its plain and natural meaning conveys a defamatory imputation about the plaintiff as alleged in the plaint, then the defendant is liable unless he pleads and proves that the person or persons to whom it was published did not understand it in that sense or to refer to the plaintiff. It is not enough for him to prove that he did not intend the words to convey a defamatory meaning.¹ He may show for instance that the words had a special meaning in the context. Thus a charge of “killing” another was shown not to impute murder as the hearers knew that the person said to have been killed was alive,² and a charge of robbery or theft was shown in a certain context to refer to a distress for rates.³ In such cases, the defendant should prove that the facts which impart a special meaning to the words were known to the hearers or readers.⁴ Similarly he may show that the words were used as a joke; but they must also have been understood as such by the persons who read or heard them. “A person shall not be allowed to murder another’s reputation in jest; the jocularity must also be shared by the bystanders.”⁵ “No one can cast about firebrands and death and then escape from being responsible by saying that he was in sport.”⁶ Another instance of words which are defamatory in their plain and natural sense but may not be so in fact is the case of words of abuse used in the heat of a quarrel, as they may not convey any injurious imputation on character.⁷ The same is the case with vituperative language employed in the course of political or journalistic controversies.⁸

15. **Third rule.**—If the statement does not convey any defamatory imputation in its natural meaning, it may be because the words are innocent,

1. See above, para. 12, note. 6.

2. *Snag v. Gee*, (1597) 4 Rep. 16 as explained by Baron Parke, in *Heming v. Power*, (1842) 10 M. & W. at p. 569.

3. *Wilk's case*, 1 Roll. Abr. 51; *Campbell v. Ritchie*, (1907) S. C. 1097.

4. *Hankinson v. Bilby*, (1847) 16 M. & W. 492; see also *Haire v. Wilson*, (1829) 9 B. & C. 643.

5. *Donoghue v. Hayes*, (1831) Hayes (Ir. Ex.) R. 265, 267.

6. *Per Lord Blackburn*, in *Capital and Counties Bank v. Henty*, (1887) L. R. 7 A. C. at p. 772.

7. *Thorley v. Lord Kerry*, (1812) 4 Taunt at p. 365; *Penfold v. Westcote*, (1806) 2 Bos. & P. N. R. at p. 6; *Agnew v. British Legal Life Assurance Co.*, (1906) 8 F. 422 (Ct. of Sess.) (‘liar’ and ‘fraud’ held to be merely abusive); *Girishchandra v. Jatadhari*, (1899) I. L. R. 26 Cal. 653; 3 C. W. N. 551; *Konu Subadra v. Subbarayadu*, (1900) 10 M. L. J. 83; *Brijnath v. Byrne*, (1912) 9 A. L. J. 253; *Harakchand v. Ganga Prasad*, (1924) I. L. R. 47 All. 391; 23 A. L. J. 151; *Subbaraidu v. Tirumala*, (1926) 52 M. L. J. 87; 1927 Mad. 329; *Girdhari Lal v. Panjab Singh*, 1933 Lah. 727; cf. *Ma Win v. Ma Ngon*, 1923 Rang. 77.

8. *Australian Newspaper Co. v. Bennett*, (1894) A. C. 284 (one newspaper calling another ‘Ananias’ for a careless report of a boat-race, held no defamation); *Madras Times v. Rogers*, (1915) 30 M. L. J. 294; 32 I. C. 408; below, para. 73. For an instance of a religious controversy, see *Kumaragurudasa Swami, v. Krishnaswami*, (1924) 47 M. L. J. 664; 1924 Mad. 898.

or true¹ or have two or more meanings some of which are innocent,² or have no well-known meaning as in the case of slang,³ provincialisms, local or technical terms not in common use.⁴ In all such cases the plaintiff should set forth, by a statement in the plaint known as the 'innuendo', the special or secondary meaning of a defamatory character, which the words complained of conveyed to the persons to whom they were published; and he should also prove the facts and circumstances which made the words convey that meaning to those persons as reasonable men.⁵ These facts and circumstances should be such as were known to the persons to whom the words were published, and as were known or ought to have been known by the defendant.⁶ Thus a statement that 'the plaintiff had given birth to a child' is not defamatory though false. But a lady recovered damages from a newspaper which published this incorrect news, on proof that she was married only a month before.⁷ In such a case the plaintiff has to adduce evidence to show that some persons who knew this fact believed the report. It is unnecessary, however, to show that the defendant knew that fact, as he ought to have known it.⁸ Where the plaintiff alleged that the defendant falsely and maliciously said of him that "he set his premises on fire," meaning thereby that, as he had insured his premises against fire, he intended to defraud the insurance company,⁹ he must prove that this fact was known to the hearers. If it was not, there would be no defamation. Formerly the plaintiff could not give evidence of such facts unless he had set them out in his plaint. These averments by way of explanation of the innuendo were known as the 'colloquium.' After the Common Law Procedure Act, 1852,¹⁰ the colloquium is no longer required. But this is only a change in the rule of pleading and does not affect the principle

1. *E. g., English and Scottish Co-operative Properties etc., Society v. Oldhams Press*, (1940) 1 K. B. 440 C. A.

2. *Hart v. Wall*, (1877) 2 C. P. D. 146; *Simmons v. Mitchell*, (1880) 6 A.C. at p. 158; *Keogh v. The Incorporated Dental Hospital of Ireland*, (1910) 2 Ir. R. at p. 586, *per* Lord O'Brien, C. J.; see also *John Leng v. Langlands*, (1916) 114 L. T. 665 (H. L.)

3. *Hickinbotham v. Leach*, (1842) 10 M. & W. 361 ('duffing' meaning faking); *M'Gregor v. Gregory*, (1843) 11 M. & W. 287 ('blackleg' meaning cheat at cards); *Dakhyl v. Labouchere*, (1908) 2 K. B. 325 n. ('quack' meaning one who lends himself to medical imposture).

4. For commercial terms, see *Flach v. London & S. W. Bank*, (1915) 31 T.L.R. 334 ("refer to drawer"). As to a case of code words sent with their key, see *White v. Credit Reform Association*, (1905) 1 K. B. 653.

5. *Capital and Counties Bank v. Henty*, (1887) L.R. 7 A.C. 741; *John Leng v. Langlands*, (1916) 114 L. T. 665 (H. L.).

6. L.R. 7 A.C. at pp. 744, 771.

7. *Morrison v. Ritchie & Co.*, (1902) 4 F. 645 (Ct. of Sess); see also *Cassidy v. Daily Mirror Newspaper*, (1929) 2 K. B. 331, below, para. 18.

8. The observations to the contrary of Brett, L.J., in *Capital and Counties Bank v. Henty*, (1880) 5 C. P. D. at p. 539 are not consistent with *Hulton v. Jones*, and other cases; see *Cassidy v. Daily Mirror Newspaper*, (1929) 2 K. B. 331.

9. *Sweetapple v. Jesse*, (1853) 5 B. & Ad. 27; *Jacobs v. Schmaltz*, (1890) 62 L.T. 121.

10. (1852) 15 & 16 Vict., c. 76, s. 61.

that the plaintiff must prove by evidence that the words were capable of conveying and did convey the meaning alleged in the plaint.¹ The facts which make apparently harmless words convey a defamatory meaning may be wholly extraneous to the words as in the last two instances ; or they may consist in the language or other circumstances attending the publication like the context, the manner of publication, *e.g.*, the tone of the speaker in the case of slander. But the evidence must be such as will satisfy the Court that the words would convey a defamatory meaning to reasonable men. It is not enough to show that they did so to some persons. Where there are a number of good interpretations it is unreasonable that the bad one only should be seized upon to give a defamatory sense to the words.² In such a case the defamer is he who, of many inferences, chooses the defamatory one.³ In fact the plaintiff cannot prove his innuendo by simply asking his witnesses in what sense they understood the words. He must, before doing so, lay a basis for his case by letting in evidence of facts which will make the words reasonably capable of the meaning alleged.⁴ In the leading case of *Capital and Counties Bank v. Henty*,⁵ the defendants, a firm of brewers, sent round to their customers and tenants a circular notice that "they will not in future receive in payment cheques drawn on any of the branches of the Capital and Counties Bank." The plaintiffs alleged that these words meant that their bank was not to be relied upon to meet the cheques drawn on them and that their position was such that they were not to be trusted to cash the cheques of their customers. The House of Lords held that reasonable persons would not understand the words in that sense and the fact that some persons did so and thereby caused a run on the bank would not make the words libellous. But these words may bear a defamatory meaning if other facts were proved, *e.g.*, that the defendants gave the notice unnecessary publicity as by publishing it in a newspaper, or that it was a time of panic in the place. Therefore the question of libel or no libel may often depend not on the words alone but on extrinsic facts. The plaintiff must prove the particular meaning alleged ; if he fails, he cannot rely on another meaning unless he had also alleged it as an alternative.⁶ It is hardly necessary to add that a defamatory imputation may be conveyed not merely by direct statement but also indirectly by query, allusion, idiom, figure of speech, slang, euphemism, irony, or by headlines, colour, size, type or arrangement of the written character.

1. L.R. 7 A.C. at p. 782, per Lord Blackburn.

2. Per Brett, L.J., in 5 C.P.D. at p. 541 ; per Lord Blackburn in 7 A.C. at p. 786.

3. Per Lord Bramwell in 7 A.C. at p. 792.

4. *Davies v. Hartley*, (1848) 3 Ex. 200 approved in *Simmons v. Mitchell*, (1880) L.R. 6 A.C. 156 ; *Shaw v. London Express Newspaper*, (1925) 41 T.L.R. 475.

5. (1887) L.R. 7 A.C. 741.

6. *Williams v. Stott*, (1833) 1 C. & M. 675 ; *Ruel v. Tatnell*, (1880) 43 L.T. 507.

16. Illustrations of the third rule.—Some decisions are given below as illustrations, but their value as precedents on the construction of particular words is very small as each case must depend on its own facts.¹

Statements held defamatory.—*Stubbs, Ltd. v. Masure*,². The defendants, proprietors of a commercial magazine, published the plaintiff's name erroneously in a weekly list of persons against whom *ex parte* decrees were obtained in the small debts Courts, the fact being that on the plaintiff paying the debt, the action was dismissed. This list was headed by a notice saying that 'in no case did the publication imply inability to pay on the part of any one named.' The plaintiff stated in the innuendo, that "he was given to or had begun to refuse or delay to make payment of his debts, and that he was not a person to whom credit should be given." It was held that the publication was defamatory in spite of the prefatory note capable of bearing this meaning, especially as this list was usually called the "Black List" and affected the credit of persons mentioned in it. But in *Stubbs, Ltd. v. Russell*,³ the plaintiff who complained of an exactly similar publication alleged that thereby it was falsely represented that he was unable to pay his debts. It was held that it was not established.

Russell v. Nolcutt.⁴—In a musical journal, a concert was announced and the name of the plaintiff, a well-known public singer, was placed third in a list of four artists. Evidence was given that the first place was a sign of superior reputation, and that the beginning and end of such announcements were superior positions as compared with the middle, and that the placing of her name third in order was calculated to injure her reputation. A verdict for the plaintiff was upheld by the Court of Appeal.

Sun Life Assurance Co. of Canada v. Smith & Son.⁵—The defendants, news-agents at railway station book-stalls had displayed a poster "More Grave Sun Life of Canada Disclosures". Held that it was capable of being read as meaning "more grave disclosures about the Sun Life of Canada" rather than "more grave disclosures by the Sun Life of Canada".

Coopooosami Chetty v. Doraisami.⁶—The words "*prayaschittam* or purification ceremony must be performed as the plaintiff has attended the funeral ceremony," are capable of a defamatory meaning as they may suggest that the plaintiff was an outcaste and thereby polluted the ceremony by his presence. But it was observed that to say that *prayaschittam* should be performed because of the plaintiff's marriage outside his sub-caste is not defamatory as no loss of caste is involved thereby.

1. See *Linotype Co., Ltd. v. British Empire Type Selling Co., Ltd.*, (1899) 81 L. T. 331 at p. 333, *per* Lord Halsbury; *Glasgow Corporation v. Lorimer*, (1911) A. C. at 615, *per* Lord Loreburn.

2. (1920) A.C. 66.

3. (1913) A.C. 386; see *R. v. Gaghan*, (1865) 4 F. & F. 316, 321, 322 (it is not libellous to say that a person owed money as this does not imply unwillingness or inability to pay); *Williams v. Smith*, (1888) 22 Q.B.D. 134; *Searles v. Searlett*, (1892) 2 Q.B. 56; *Lachhmi Narain v. Shambhunath*, 1931 All. 126 (notice of importers selling the plaintiff's goods for refusal to pay, not defamatory).

4. (1896) 12 T.L.R. 195; see also *Elen v. London Music Hall*, Times, May 31st and June 1, 1906 (a music hall artist complained of not being "starred" in the bills and placards by the defendants).

5. (1934) 150 L. T. 211.

6. (1909) 1 L. R. 33 Mad. 67; 19 M. L. J. 714; (1912) M. W. N. 1220; 17 I. C. 527; cf. *Venkayya v. Venkataramiah*, (1914) 28 M. L. J. 58; 26 I. C. 460.

Statements held not defamatory.—*Mulligan v. Cole*.¹—"Walsall Science and Art Institute. The public are informed that Mr. Mulligan's connection with the Institute has ceased and that he is not authorised to receive subscriptions in its behalf." The innuendo was that the plaintiff falsely assumed and pretended to be authorised to receive subscriptions on its behalf. It was held that the advertisement was not capable of this meaning.

*Nevill v. Fine Arts & General Insurance Co., Ltd.*²—The plaintiff had an agency from the defendant company who sent out a circular that his agency had "been closed by the directors." The innuendo was, "that the plaintiff had been dismissed by the defendants from his employment as agent for some reason discreditable to him." It was held that the words were incapable of a libellous meaning.

Frost v. London Joint Stock Bank.³—Plaintiff drew a cheque in favour of A on his bank. A presented it to the bank which by an error returned it to A with a slip attached marked "Reason assigned—Not stated." The plaintiff alleged that these words meant that the cheque had been dishonoured through want of assets. It was held that no circumstances were proved to show that the words could be understood by reasonable persons in a libellous sense.

Sim v. Stretch.⁴—On the plaintiff's housemaid re-entering the defendant's service, the latter sent a telegram to the former, "Please send her possessions, the money you borrowed and also her wages." Innuendo, that plaintiff was in pecuniary difficulties and had failed to pay her wages and was unworthy of credit. Held, not proved.

Caron v. British Dental Association.⁵—An article in the British Dental Journal, "while the ostensible object of the clinic (National Denture Clinic for the supply of dentures to the deserving poor) may be entirely praiseworthy, there were certain features of the organisation which the Council (of the British Dental Association) thought, required close scrutiny". Innuendo alleging dishonesty, deceit and misapplication of funds; held, not proved.

Cox v. Cooper.⁶—To say of the plaintiff that "he had sued his mother-in-law" was held not defamatory in the absence of proof of special facts.

Keogh v. Incorporated Dental Hospital of Ireland.⁷—The committee of a hospital passed a resolution on the plaintiff's application for admission "that Mr. K. cannot be accepted as a student." The committee had a right under the bye-laws to refuse any student without cause. It was held not defamatory in the absence of extrinsic evidence.

17. Fourth rule.—If the statement in its ordinary meaning conveys a defamatory imputation but does not refer to the plaintiff, then also the plaintiff should allege that it was understood to refer to him, and prove it

1 (1876) L. R. 10 Q. B. 549; cf. *Beswick v. Smith*, (1908) 24 T. L. R. 169. See (1936) 182 L. T. 405.

2. (1897) A. C. 68; cf. *Hunt v. Goodlake*, (1879) 29 L. T. 472.

3. (1906) 22 T. L. R. 760; *Flach v. London & South Western Bank*, (1915) 31 T. L. R. 334, is a similar case where the words were 'Refer to drawer'; but falsely to say 'Refused for want of funds' is defamatory though the usual form of action against a banker in such cases is for breach of contract; see *Rolin v. Steward*, (1854) 14 C. B. 595; *Fleming v. Bank of New Zealand*, (1900) A. C. 577; cf. *Lionel Barber & Co. v. Deutsche Bank*, (1919) A. C. 304. Above, para. 2.

4. (1936) 2 A. E. R. 1237.

5. (1936) 182 L. J. 95.

6. (1863) 9 L. T. 329.

7. (1910) 2 Ir. R. 577.

by evidence of circumstances of the nature already explained.¹ A person cannot sue in respect of defamatory words referring to another, even if the latter were his near relation.² He may have a criminal remedy for the offence of insult, in respect of words which defame his near relation living or dead.³ He may have also a civil cause of action if such words result in pecuniary damage to him; for instance, a tradesman recovered for injury to his business by words defaming his wife who assisted him in the shop.⁴ But the wrong is not defamation but belongs to the category of injurious falsehood. Some words like 'cuckold' or 'bastard' though used with reference to one person may defame another by implication, and the latter can sue for defamation.⁵ An action was allowed in respect of words imputing misconduct to the plaintiff's wife which degraded him in his caste.⁶ A person cannot sue for defamation in respect of words which are only in disparagement of his property or goods⁷; his remedy is an action for slander of title or of goods. He can sue for defamation if they also reflect on his reputation, personal, professional or commercial;⁸ e.g., when it is said that a person sold poisoned wine,⁹ obscene books,¹⁰ or bad and worthless typewriting machines,¹¹ that the cottages let by a colliery company to its workmen were insanitary and unfit for human habitation, thereby imputing bad management to the company,¹² that a will

1. If the statement of claim does not state those circumstances, particulars can be asked for; *Bruce v. Oldhams*, (1936) 1 K. B. 697.

2. *Subbaiyer v. Kristnaiyer*, (1878) 1 L. R. 1 Mad. 383 (brother cannot sue for slander of sister); see also *Brahman v. Ramakrishnamma*, (1894) 1 L. R. 18 Mad. 250; 5 M. L. J. 89; *Luckum Sey v. Hurbur*, (1881) 1 L. R. 5 Bom. 580; *Dave v. Parum Sutch*, (1888) 1 L. R. 11 All. 104; *Girwar Singh v. Siraman Singh*, (1906) 1 L. R. 32 Cal. 1060; 9 C. W. N. 847.

3. *R. v. Topham*, (1791) 4 T. R. 126; *R. v. Esnor*, (1887) 3 T. L. R. 366; *Broom v. Ritchie*, (1905) 6 F. 942 (Ct. of Sess.).

4. *Riding v. Smith*, (1876) 1 Ex. D. 91; cf. *Ashley v. Harrison*, (1793) 1 Peake 25.

5. *Vicars v. Worth*, (1722) 1 Strange 471; *Hodgkins v. Corbett*, (1723) 1 Strange 545; see also *Huckle v. Reynolds*, (1859) 7 C.B.N.S. 114; *Cussey v. Daily Mirror*, (1929) 2 K.B. 331; below, para. 18. 6. *Sukkan Teli v. Bihad*, (1906) 1 L.R. 34 Cal. 48.

7. *Evans v. Harlow*, (1844) 5 Q.B. 624; *Societe Francaise des Asphaltes v. Farrell*, (1885) Cab. & El. 563; *Australian Newspaper Co., Ltd. v. Bennett*, (1894) A.C. 284; *Hubbuck and Sons v. Wilkinson*, (1899) 1 Q.B. 86; *Griffiths v. Benn*, (1911) 27 T.L.R. 346.

8. For illustrations, see *Hurnum v. Delany*, (1731) 2 Stra. 898; *Thorley's Cattle Food Co. v. Massam*, (1880) 14 Ch. D. 763; *Ingram v. Lawson*, (1840) 6 Bing. N.C. 212; *Jenner v. A'Beckett*, (1871) 1 L. R. 7 Q.B. 11; *Latimer v. Western Morning News Co.*, (1871) 25 L.T. 44; *Thomas v. Williams*, (1880) 14 Ch. D. 864; *Bendie v. United Kingdom Alliance*, (1915) 31 T.L.R. 403.

9. *South Hetton Coal Co. v. N. E. News Association*, (1894) 1 Q.B. at p. 139, per Lord Esher, M.R.

10. *Tubert v. Tipper*, (1808) 1 Camp. 350 at 353; *Merivale v. Carson*, (1887) 20 Q.B.D. 275.

11. *Linotype Co., Ltd. v. British Empire Typesetting Machine Co., Ltd.*, (1889) 61 L.T. 331.

12. *South Hetton Coal Co. v. N. E. News Association*, above.

is a rank forgery thus casting a reflection on the solicitor who prepared it.¹ It is also defamatory to mention a person's name without his consent in connection with inferior goods,² literary or other productions,³ as by passing off an inferior novel as the work of a reputed author. If no reflection on his reputation is thereby conveyed, the unauthorised use of his name in relation to another's goods is not actionable defamation, however annoying it may be to him. It may however amount to the kind of injurious falsehood known as 'passing off.'⁴ When a definite class of people is libelled, any one or more of that class can sue,⁵ e.g., the members of a club or association. When however the words refer to a large and indefinite class of people (e.g., 'all lawyers are thieves')⁶ or indefinitely to one or more of a definite class (e.g., 'some of the members of an association' or 'one of you two')⁷ one of them cannot sue unless he alleges and proves that he in particular was referred to. Thus when it was said that "some Irish factories practise cruelties on their workmen," it was proved that the plaintiff's factory was thereby meant.⁸ A person may be referred to without being named, by his initials,⁹ personal or facial peculiarities (e.g., a one-eyed man being referred to as 'Cyclops')¹⁰ or by fanciful names¹¹ or by other devices. The cases on this point were usually those in which such devices were employed by the defamer to make a veiled attack on another. In such cases the question is whether they were understood by ordinary,

1. *Seaman v. Netherclift*, (1876) 1 C.P.D. 540.

2. See e.g., *Clark v. Freeman*, (1848) 11 Beav. 112; *Dockrell v. Dougall*, (1899) 80 L.T. 556 (where however no libel was proved).

3. *Byron (Lord) v. Johnston*, (1816) 2 Mer. 29; *Archbold v. Sweet*, (1832) 5 C. & P. 219; *Lee v. Gibbings*, (1892) 67 L.T. 263; *Ridge v. English Illustrated Magazine*, (1913) 29 T.L.R. 592; *Krishnappa v. Swami Akhanda*, (1938) 42 C.W.N. 1045.

4. See below, Chap. X.

5. See e.g., *Foxcroft v. Lacy*, (1614) Hobart 89; *Irwin v. Reid*, (1920) I.L.R. 48 Cal. 304, 317; 25 C.W.N. 150.

6. *Eastwood v. Holmes*, (1858) 1 F. & F. 347 at p. 349; see however, *Joynt v. Cycle Trade Publishing Co.*, (1904) 2 K.B. 292 ("certain members of the legal profession").

7. *Sir John Borne case*, (1597) 1 Roll. Abr. 81 pl. 13 cited by Popham, C.J., in *Jones v. Davers*, (1598) Cro. Eliz. at p. 497 ("one of you is perjured," none can sue); Gatley, p. 123.

8. *Le Fanu v. Macdonalson*. (1843) 1 H.L.C. 637. See *Knappfer v. London Express Newspaper*, (1943) 1 K.B. 80 C.A.

9. *O'Brien v. Clement*, (1846) 16 M. & W. 159; as to asterisks being used, see *Bourke v. Warren*, (1826) 2 C. & P. 307; for terminal letters, *Levi v. Milne*, (1827) 4 Bing. 195.

10. *I'Anson v. Stuart*, (1787) 1 T.R. 748.

11. For reference by allegorical or historical names, see *R. v. Clerk*, (1729) 1 Barn. 304 (where the King and his Court were libelled in *Mist's Weekly Journal* under the names of various dignitaries of the Persian Court); for intentional misdescription, see *Briton Life Association Ltd. v. Roberts*, (1886) 2 T.L.R. 319 (where the plaintiffs were described as 'Briton Life Office').

reasonable men to refer to the plaintiff. The case of *Hulton v. Jones*,¹ was one of unintentional reference to the plaintiff and presented a problem not covered by precedent.² The plaintiff, Mr. Artemus Jones, a practising barrister in London, sued the defendants, the proprietors of the "Sunday Chronicle" for libel contained in an article which was written by their Paris correspondent about a motor show at Dieppe in France. The writer dilated on the levity of conduct of Englishmen who went to the show and referred to a 'Mr. Artemus Jones,' 'church-warden at Peckham' associating with women of ill-repute. The writer deposed that the name was a fictitious one invented by him for the purpose of the article, and both he as well as the editor of the paper stated that they did not intend to refer to the plaintiff and did not know him or anybody else bearing his name. These statements were accepted by the plaintiff as true. On the other hand his witnesses gave evidence that they understood the words to refer to him. In upholding a verdict for the plaintiff the House of Lords held that if reasonable men understood the words to refer to the plaintiff, the defendants would be liable notwithstanding the absence of any intention to defame the plaintiff. The defendants relied on the traditional form of the declaration that "the defendant wrote and published the words 'maliciously' and 'of and concerning the plaintiff';" but these phrases were treated as mere form and surplusage.³ As regards the argument that the decision would result in the anomaly that if there were two or three persons of that name, every one would be enabled to give similar proof and claim damages, Farwell, L.J., in the Court of Appeal remarked that he did not see any objection in it.⁴ This decision has been criticised as extending the rule of liability for defamation beyond the limit of older precedents.⁵ "It may be described as adding a terror to authorship and is not one which this Court (Court of Appeal) at any rate need extend."⁶ But it appears to render that rule uniform and rational, which can be

1 (1910) A.C. 20; (1909) 2 K.B. 444; see also *Shaw v. London Express Newspaper*, (1925) 41 T.L.R. 475; *Blennerhassett v. Novelty Sales Service Ltd.*, (1933) Times, May, 19; 75 L.J. 348; *Marchant v. Ford*, (1936) 2 A.E.R. 1510; *Lord v. Croydon Advertiser Co., Ltd.*, (1935) Times, March 2, cited in Fraser, Libel & Slander (9th Edition), p. 43; (1938) 85 L.J. 234. 2 Holdsworth, Vol. VIII, p. 370.

3. (1910) A.C. at p. 24, Lord Loreburn, L.C. In the C.A., Fletcher Moulton, L.J., relied on these words among other grounds for his dissent.

4. (1909) 2 K.B. at 481. For such an instance see the Australian cases, *Arthur Lee v. Wilson* and *Clifford Lee v. Wilson*, 51 L.Q.R. 572. Where however a person published a true report of an existing person he cannot be sued by others on the ground that they were mistaken for the real person by a coincidence in name; per Lord Dunedin in *D.C. Thomson and Co. v. McNulty*, Times, (1927) 71 S.J. 744.

5. Pollock, 25 L.Q.R., pp. 341, 342; Holdsworth, A Chapter of Accidents in the Law of Libel, 57 L.Q.R. 74.

6. *Knappfer v. London Express Newspaper*, (1942) 2 A.E.R. 555, 561, per Goddard, L.J.

stated thus: a person is liable if reasonable men understand his words to convey a defamatory meaning or to refer to the plaintiff.¹ In applying this rule the Court of Appeal has held in *Newstead v. London Express Ltd.*,² that it does not matter that the statement complained of was true of an existing person. It is important to bear in mind that the Court must be satisfied that the words were and could reasonably be understood to refer to the plaintiff. It is not enough that some persons come and give evidence—though honestly—that they so understood.³ The above rule is in accordance with decisions in the United States⁴ and has been followed in India.⁵

ILLUSTRATIONS.

*Yousouppoff v. Metro-Goldwyn-Mayer Pictures Ltd.*⁶—The defendants issued a talking film entitled "Rasputin, the mad monk" depicting incidents in the life of a notorious Russian personality, including the rape by him of a Russian princess and his subsequent assassination by the princess's betrothed. The plaintiff, a Russian princess, complained that she was referred to and called evidence to show that the character was so understood. A verdict in her favour was upheld by the Court of Appeal.

*Newstead v. London Express Ltd.*⁷—The defendant newspaper published photographs of two women with a statement underneath that Harold Newstead, a 30-year old Camberwell man had been convicted of bigamy. The plaintiff complained that the statement was understood to refer to him though it was true of another man of the same name in Camberwell. The Court of Appeal held that the plaintiff could recover.

*Knuppfer v. London Express Newspapers.*⁸—Plaintiff complained that words referring to an association of Russian political refugees was an attack on him personally. The association had a very large membership in many countries though in England where the article was published the association had only 24 members. The Court of Appeal dismissed his action, holding that where words are written or spoken of a class of persons no member of it can sue unless the class is a small and identifiable one or there was something to show that the words referred to him.

18. Nature of liability for defamation.—The liability as regards the actual meaning of the words published or their reference to the plaintiff does not depend on the intention of the person publishing them. Absence of intention is no defence, though it may mitigate damages. In the form in which the law was stated in *Hulton v. Jones*, and other cases referred to

1. See per Lord Shaw in (1910) A.C. at p. 26; Scrutton, L. J. in *Yousouppoff v. Metro-Goldwyn-Mayer Pictures Ltd.*, (1934) 50 T.L.R. 581, 583 and *Cassidy v. Daily Mirror*, (1929) 2 K.B. 331, 341.

2. (1939) 4 A.E.R. 319 C.A. There was a suggestion *contra* in the judgment of Lord Dunedin in *Thomson & Co. v. McNulty*, (1927) 71 S.J. 744 which however was not referred to in the above case.

3. *Knuppfer v. London Express Ltd.*, (1942) 2 A.E.R. 555 C.A.

4. Gatley, p. 125; Wigmore, Cases on Torts, Vol. I, p. 1040.

5. *Ogilvie v. Panjab Akhbarat Co.*, (1929) I.L.R. 11 Lah. 45; *Providence v. Christenson*, (1914) 24 I.C. 449 (Bur.); cf. *Naganatha v. Subramania*, (1917) 32 M.L.J. 392, 398; 40 I.C. 126, per Sadasivier, J.

6. (1934) 50 T.L.R. 581 C.A.

7. (1939) 4 A.E.R. 319 C.A.

8. (1942) 2 A.E.R. 555 C.A.

above, the liability would seem to be absolute and absence of negligence would appear to be no defence.¹ But it is possible to regard fiction-writing of the kind in *Hulton v. Jones* as negligent or even reckless² and too risky for a prudent person to engage in. In *Cassidy v. Daily Mirror Newspapers*³ the defendants in their paper published a photograph with the following words underneath, "Mr. M. Corrigan, the race-horse owner and Miss 'X' whose engagement has been announced." They were held liable in a suit by a person who said she was the lawful wife of Mr. Corrigan and complained that the words suggested that she was living with him in immorality. The defendants no doubt did not know of this fact and had also the authority of Mr. Corrigan to publish the item of news. But their liability could be rested on their failure to make independent enquiry. If such a standard of care is impracticable in the conduct of a modern newspaper, the liability is properly regarded as absolute and justified by the ultra-hazardous nature of journalistic activities at the present day.⁴ The vicarious liability of a proprietor and publisher of a newspaper for a libel printed and published under their authority is also absolute and rests on the same principle of policy.

19. Fifth rule.—An innuendo and proof of special circumstances are essential for the plaintiff to succeed in an action in cases referred to in the third and fourth rules above. In the case referred to in the second rule where the words are *prima facie* defamatory of the plaintiff an innuendo is not necessary but the plaintiff may allege and prove a special defamatory sense in addition to the natural meaning.⁵ If he fails to prove it, he may still rely on the natural meaning.⁶

20. Sixth rule.—In the case of representations as distinguished from words or statements, the plaintiff must allege in the plaint and prove how they defame him. He may show that a pictorial representation or caricature involves a reflection on his character or holds him up to ridicule.⁷ Whether it has that tendency would depend on the circumstances of the case and be decided by the test already discussed. The

1. This rule is also proposed in the Draft Restatement, (1935) §§ 1006, 1023. See however Winfield, *Law of Torts*, pp. 281, 287.

2. (1909) 2 K.B. at p. 480, *per* Farwell, L.J., whose judgment was accepted by two of the Law Lords in the H.L. But his theory that intent was the gist of the action and made out by recklessness as in an action of deceit is perhaps open to question as it would thereby revive the defunct fiction of intent or malice in actions for defamation.

3. (1929) 2 K.B. 331. See also *Hough v. London Express Newspaper*, (1940) 2 K.B. 507 C.A.

4. Below, Chap. XV, paras. 1 and 2. As to articles by fictitious correspondents, below, para. 74.

5. *Harvey v. French*, (1832) 1 Cr. & M. 11; *Barrett v. Long*, (1851) 3 H.L.C. 395.

6. *Holdsworth, Ltd. v. Associated Newspapers, Ltd.*, (1937) 3 A.E.R. 872, 879.

7. *Monson v. Tussauds*, (1894) 1 Q.B. 671; *Dunlop Rubber Co. v. Dunlop*, (1921) 1 A.C. 367; *Cassidy v. Daily Mirror*, (1929) 2 K.B. 331.

publication of portraits and caricatures of well-known personages is so common a feature of modern journalism that it does not ordinarily convey any defamatory meaning to reasonable men. But a plain, ordinary citizen not known to fame may well complain of an unauthorised portrait or caricature as holding him up to ridicule.¹ The use of a person's name or photograph for the purpose of commercial advertisements may convey a defamatory meaning. In *Tolley v. Fry & Sons*,² the plaintiff, an amateur golfer, was caricatured by the defendants, chocolate manufacturers, as playing golf with a packet of their chocolate protruding from his pocket. It was held that this was capable of conveying a defamatory meaning, *viz.*, that the plaintiff was abusing his position as an amateur golfer for advertising purposes and was seeking gain by such means. When the publication of a portrait is not capable of a defamatory meaning, no action lies though it was unauthorised and caused annoyance to the person concerned.³ In the United States this has become such a great evil that some courts have held that the unauthorised publication of a person's photograph is actionable as an invasion of the right to privacy.⁴

21. Seventh rule.—In India the plaintiff has to satisfy the judge on the above points. In England the jury has to decide whether the words convey a defamatory meaning about the plaintiff. Their verdict is final and will not be upset unless it is clearly perverse.⁵ But a judge has the power to withdraw the case from the jury if he considers, (a) in the case referred to in the second rule above, that in their natural meaning the words are incapable of conveying any defamatory imputation about the plaintiff to reasonable men, and (b) in the cases referred to in the third and fourth rules that there is no evidence of any such special circumstances as would make the words capable of the defamatory imputation complained of. If the judge wrongly omits to exercise this power and proceeds to obtain the jury's verdict, the Court of Appeal can in exercise of that power upset the verdict and dismiss the action. This rule was laid down in

1. *Dunlop v. Dunlop Rubber Co.*, (1920) 1 Ir. R. 280, 291, *per* Powell, J.

2. (1931) A.C. 333; see also *Funston v. Pearson*, Times, March 12, 1915; *Gateley*, p. 31 (photograph of actress without teeth for advertisement of a dentist); *Honeysett v. News Chronicle*, (1935) 179 L.T. 362; *Plumb v. Jeyes' Sanitary Compounds, Ltd.*, (1937) 83 L.J. 289 (police-officer's picture used for advertisement of a fluid foot-bath); *Garbett v. Husell & Co., Ltd.*, (1943) 2 A.E.R. 359 C.A. (pictorial representation of photographer in an illustrated paper conveying the suggestion that he dealt in indecent pictures).

3. *Corelli v. Wall*, (1906) 22 T.L.R. 532 (where the use of the photograph of Marie Corelli, the novelist, was held not wrongful though annoying to her). It may be breach of contract; *Pollard v. Photographic Co.*, (1880) 40 Ch. D. 345. Below, Chap. XII, para. 13.

4. Wigmore, *Cases on Torts*, Vol. I, pp. 749 to 763; *Selected Essays on Torts*, p. 128; below, Chap. XII, para. 12.

5. *Brooms v. Agar*, (1928) 138 L.T. 698 (owner of motor car saying of her chauffeur that he gave joy-rides to women in her Rolls-royce car, verdict against plaintiff, chauffeur, upheld); see also *Lockart v. Harrison*, (1928) 139 L.T. 521 (H.L.).

*Capital and Counties Bank v. Henty*¹ and has since been applied in many cases. The reason for the assertion of the judge's power was the well-known bias of juries and their tendency to give unreasonable verdicts in favour of plaintiffs.²

22. Publication.—This word is not used here in the popular sense of giving publicity, but means the communication of the defamatory matter to some person or persons other than the defamed.³ This is the gist of the wrong of defamation and not the mere speaking or writing of defamatory words.⁴ Therefore there is no defamation if *A* speaks ill of *B* to *B*'s face in a place where nobody else hears *A*, or if *A* writes and sends to *B* a sealed letter defamatory of *B*, or keeps it locked in his own desk. In pleading publication the plaintiff must specify the person or persons to whom the defendant published, the time, manner, etc. The averments must be clear⁵; otherwise the defendant can apply to strike them out as vague⁶ or ask for particulars.⁷ Publication is proved in the case of slander, by the fact that the defendant spoke the slanderous words about the plaintiff to another,⁸ and in the case of libel, by the fact that the defendant delivered or sent by post or messenger the libellous document to another, or had it printed, typed or copied,⁹ or put it up as a placard, or did any other act which had a like effect,¹⁰ e.g., a man

1. (1882) L.R. 7 A.C. 741.

2. L.R. 7 A.C. at 775. For the history of the jury's powers, see L.R. 7 A.C. at p. 771. It is interesting to compare the reasons for the limitation imposed by this case on the jury's powers with those for the popular agitation for extending them which ended in the passing of Fox's Libel Act in 1792. See below, para. 33.

3. *Govindan Nair v. Achyuta Menon*, (1915), I.L.R. 39 Mad. 433; 28 M.L.J. 310.

4. *Hebditch v. MacIlwaine*, (1894) 2 Q.B. at pp. 56, 64; *White v. Stone Ltd.*, (1939) 2 K.B. 327 C.A.

5. *Nannu Mal v. Ram Prasad*, 1926 All. 672.

6. *Davey v. Bentinck*, (1893) 1 Q.B. 185 (action dismissed for want of particulars); *Davies v. Rolleston*, (1920) 149 L.T. Jour. 84; W.N. 19 (C.A.). See *Marchant v. Ford*, (1936) 2 A.E.R. 1510 (an allegation of assisting to publish is one of publication).

7. *Bradbury v. Cooper*, (1883) 12 Q.B.D. 94; *Roselle v. Buchanan*, (1886) 16 Q.B.D. 656; *Keogh v. Incorporated Dental Hospital of Ireland*, (1910) 2 Ir. R. 166; the plaintiff cannot deliver interrogatories to defendant to disclose the names of persons to whom he published; *Burham v. Huntingfield*, (1913) 2 K.B. 193; or to disclose the names of his informants for the purpose of suing the latter; *Edmondson v. Birch Co.*, (1905) 2 K.B. 523; cf. *Chapman v. Leach*, (1920) 1 K.B. 336; or to make admissions which would incriminate the person admitting; *Triplex Glass Co. v. Lancegay Safety Glass Ltd.*, (1939) 2 K.B. 395 C.A.; or in the case of a newspaper to disclose the name of an anonymous correspondent; *Hennessey v. Wright*, (1888) 24 Q.B.D. 445 n. See below, para. 74.

8. Dictating a letter to a clerk is publication of slander and not of libel. See 15 Har. L.R. p. 230; Gatley, p. 93. Reading it out is also slander; *Osborn v. Thomas Boulter & Son*, (1930) 2 K.B. 226.

9. The handing of a letter to a clerk to be press-copied is not publication in the absence of evidence that he read it, as taking a press-copy is a purely mechanical process; *Western Union Telegraph Co. v. Cashman*, (1906) 140 Fed. R. 367; Gatley, p. 93.

10. There is no publication if *A* and *B* draw up a libel of *C*; *Doraiswami v. Kanniappa*, 1931 Mad. 487, per Jackson, J.; see also *Trevellion v. Minck*, 1934 All. 203.

sitting silently on the roadside and pointing the attention of passers-by to a libellous placard.¹ In *Byrne v. Deane*,² it was held that where some unknown person had put up a defamatory notice on the walls of a club, the office-bearers of the club who failed to remove the notice after knowing of it would be liable for publication. A new mode of publishing slander has become possible, *viz.*, by a broadcasting agency allowing the slanderer to speak through its apparatus.³

23. Proof of publication.—The plaintiff must prove as a fact actual publication or some act which in the ordinary course of things results in it. For instance sending a defamatory letter by post to a third person is *prima facie* proof of publication.⁴ It is open to the defendant to prove that the letter did not reach the addressee or was not read by him. Similarly sending an open post-card with defamatory statements in it is *prima facie* proof of publication though it is sent only to the defamed party.⁵ It is open to the defendant to prove, if he can, that nobody else read it or that its language was such that it could not be understood by third parties to defame the plaintiff though the plaintiff could have so understood it.⁶ Sending a telegram is publication to the telegraph clerks,⁷ unless it was in code or otherwise unintelligible. In other cases actual publication to a third party must be proved. In *Huth v. Huth*⁸ the defendant sent a defamatory letter enclosed in an envelope which was not pasted. He also affixed a half-penny stamp instead of a one-penny and thus made it liable to be opened by postal officials for examining its contents. It was held that the principle applicable to open post-cards cannot be extended to the case of an ungummed letter, and that, in the absence of proof that some postal official read the letter, the plaintiff could not succeed. It was also held that the fact that the butler of the addressee took the letter out and looked into it was not the natural consequence of the defendant's act but was an improper act done out of curiosity for which the defendant could not be liable. Publication involves that the hearer or reader understood what was published; for instance, speaking in a foreign language not understood by the hearers or sending a telegraph message in code is no publication. Every publication is a fresh cause of action.⁹ It must be before suit and cannot be proved by later acts. They would be relevant however for proving malice or aggravating damages. In England, it is for the jury to

1. *Hird v. Wood*, (1894) 38 Sol. J. 234; see also *Spall v. Massey*, (1819) 2 Stark. 559 (putting up a notice). 2. (1937) 1 K. B. 818, 835.

3. As to liability of such agency, see above, para 3; below, para. 28.

4. *Warren v. Warren*, (1834) 1 C. M. & R. 250.

5. *Sadgrove v. Holt*, (1901) 2 K. B. 1.

6. *Ibid.*

7. *Williamson v. Freer*, (1874) L. R. 9 C. P. 393.

8. (1915) 3 K.B. 32.

9. As to action for a publication outside British territory. see below, Chap. XIX, para. 35.

find whether the facts relied on to prove publication are true and for the judge to decide whether the facts proved constitute publication.

24. Person to whom publication is made.—He must necessarily be some person other than the plaintiff and the defendant. That person may be the husband or wife of the plaintiff.¹ But it has been held that there can be no publication in law to the defendant's husband or wife²; the reason is said to be that the publication in such cases is incapable of proof as communications between husband and wife are privileged from disclosure in a Court of law.³

25. Liability for publication.—It has to be considered in the following cases: (a) Intentional publication, (b) Publication by the negligence of the author of a defamatory statement or some other person, (c) Publication by agents or servants, (d) Joint liability for publication.

26. Intentional publication.—There is an intentional publication of slander if a person speaks slanderous words of his own or repeats another's.⁴ "Tale-bearers are as bad as tale-makers."⁵ A person has no right to give publicity to slander though it was originally spoken by another or by the person defamed about himself. Where in an after-dinner speech humorous but disparaging words were spoken of the plaintiff by one of the company and the words were afterwards published by a newspaper, the latter was held liable. The plaintiff might not care about what was said at the time but might well object to a publication to others who did not know him. A⁶ person intentionally publishes a libel when he delivers the libellous document to another with knowledge of its contents.

27. Publication by negligence of the author of a defamatory statement.—The publication of a libel by its author may be due to his want of care in keeping the libellous document; otherwise he is not liable, as where a thief steals it from his locked desk⁷ or a mischievous servant takes it out and reads it or gives it to another person.⁸ His negligence may consist in sending it to a third person by mistake, e.g., by putting it in a wrong envelope.⁹ He is liable if he communicates defamatory statements

1. *Wenman v. Ash*, (1853) 13 C.B. 836; *Jones v. Williams*, (1885) 1 T. L. R. 572; *Praed v. Graham*, (1889) 24 Q. B. D. 53 C.A; *Watt v. Watt*, (1905) A. C. 115; *Watt v. Longsdon*, (1930) 1 K. B. 130.

2. *Wenmhak v. Morgan*, (1888) 20 Q. B. D. 635; for a criticism of this rule, see Spencer Bower, p. 8.

3. Indian Evidence Act, S. 122. 4. *Forrester v. Tyrrell*, (1893) 9 T. L. R. 257.

5. Odgers, Libel and Slander, p. 144.

6. *Dolby v. Newnes*, (1887) 3 T. L. R. 393; see also *Cook v. Ward*, (1830) 6 Bing. 409.

7. *Per Escher, L. J.*, in *Pullman v. Hill*, (1891) 1 Q. B. 524.

8. *Weld-Blundell v. Stephens*, (1920) A. C. 956, 986, 987.

9. *Fox v. Broderick*, (1864) 14 Ir. C. L. 453; *Tompson v. Dashwood*, (1883) 11 Q. B. D. 43 (contra) was overruled by *Hebditch v. MacIlwaine*, (1894) 2 Q. B. 54.

by a post-card or telegram instead of by a sealed letter to the party defamed. He will also be liable if he sends a sealed letter to the defamed party intending or knowing it to be likely that it would be opened by someone else, like a partner, relation, or clerk.¹ Otherwise he is not liable for the publication which may actually result.²

23. Publication by negligence of a person other than the author of a defamatory statement.—A person other than the author of a libel may cause a publication by delivering, printing or selling the libel. If he does so, he is liable unless he shows that he did not know and was not reasonably bound to know the libellous nature of the statement which he published.³ Persons like a carrier, postman, newsboy, book-distributor, news-vendor, bookstall-keeper, library-proprietor, are not bound to know the matter which they disseminate.⁴ A person who lends a book without knowledge of its contents, or a newspaper to another to read is not liable for publication.⁵ "A newspaper is not like a fire; a man may carry it about without being bound to see that it is likely to do an injury."⁶ But the printer, publisher or editor of a newspaper, book or pamphlet is bound to know the matter which is printed and published by him or under his authority, and is liable to pay damages though the libel was written by another⁷ or was due to an inadvertent mistake.⁸ Proprietors of a newspaper are liable vicariously for the libels published in their paper by those whom they

1. *Delacroix v. Thevenot*, (1817) 2 Stark. 63; *Gomersall v. Davies*, (1898) 14 T.L.R. 430 C. A. He may guard against such publication by marking the letter as "private"; *per Lopes, L. J.*, in *Pullman v. Hill*, (1891) 1 Q. B. 524, at 529 C. A.

2. *Huth v. Huth*, (1915) 3 K. B. 32; see also *Sharp v. Skues*, (1909) 25 T. L. R. 336; *Keogh v. Incorporated Dental Hospital*, (No. 2), (1910) 2 Ir. R. 577; *Roff v. British and French Chemical Co.*, (1913) 2 K. B. 677.

3. *Emmens v. Pottle*, (1885) 16 Q. B. D. 354; the onus is on the defendant; *Visetelly v. Mudie's Select Library*, (1900) 2 Q.B. 170.

4. *Emmens v. Pottle*, above (news-vendors); *Day v. Bream*, (1827) 2 Moo. & Rob. 54 (parcel carrier); *Mallon v. Smith & Son*, (1893) 9 T. L. R. 621; *Martin v. Trustees of the British Museum*, (1894) 10 T. L. R. 338 (library proprietors); *Visetelly v. Mudie's Select Library*, above (library proprietors held liable, as they had continued to circulate the defamatory book even after a notice had been issued by the publishers calling in the book); *Weidon v. Times Book Co.*, (1911) 28 T. L. R. 143 (book-distributing agents); *Bottomley v. Woolworth, Ltd.*, (1933) 43 T. L. R. 521; (sellers of old magazines, containing libels on Horatio Bottomley, held not liable); *Sun Life Assurance Co., of Canada v. Smith & Son*, (1934) 150 L. T. 211; see *Haynes v. DeBeck*, (1914) 31 T. L. R. 115 (as to costs against innocent distributors of libel).

5. *McLeod v. St. Aubyn*, (1899) A. C. 549.

6. *Per Bowen, L. J.*, in *Emmens v. Pottle*, (1885) 16 Q. B. D. at p. 358.

7. *Watts v. Fraser*, (1835) 7 A. & E. 223 (editor and printer); *Johnson v. Hudson*, (1836) 7 A. & E. 233; *Keyser and another v. Newscomb*, (1859) 1 F. & F. at p. 562.

8. *Harrison v. Pearce*, (1858) 1 F. & F. 567; *Blake v. Stevens*, (1864) 4 F. & F. 232; *Shepherd v. Whitaker*, (1875) L.R. 10 C.P. 502; *Morrison v. Ritchie*, (1902) 4 F. 645 (Ct. of Sess.)

employ.¹ In England the Legislature has allowed proprietors and others liable for a newspaper libel published without malice and gross negligence, to avoid liability by a full and open apology in the newspaper.² A broadcasting agency will, of course, be liable for negligently as well as wilfully publishing slander by allowing the slanderer to use its apparatus, but in the United States some courts have held such agencies liable even in the absence of negligence.³

29. Publication by agents or servants.—A corporation is liable for the slander or libel published by its agents or officers within the scope of their authority.⁴ The liability of a proprietor of a newspaper rests on the same ground.⁵

30. Joint liability for publication.—Joint liability of two or more persons for a single publication may arise in cases of principal and agent or master and servant, or where they have joined in publishing a libel; e.g., writer, printer and distributor of a book or newspaper. Persons who are jointly liable for a publication may be sued together and are jointly and severally liable for the whole damage arising from it. The author of a libel cannot sue another for having published it and thus enabled the defamed to sue and get damages from the former.⁶

31. Points which need not be proved in an action for defamation.—In the statement of claim or plaint it has been customary to allege that “the defendant A.B. falsely and maliciously wrote or spoke and published to one C.D. the following words of and concerning the plaintiff and by the publication of the said words the plaintiff has been much injured in his credit and reputation.”⁷ But the plaintiff need not prove (a) falsity,

1. *Dina Nath v. Sayad*, (1929) I.L.R. 10 Lah. 816; see cases in p. 269, notes 5 and 8; *Ogilvie v. Punjab Akhbarshah Co.*, (1929) I.L.R. 11 Lah. 45. As to their criminal liability, see 6 and 7 Vict., c. 96, S. 7; *R. v. Walter*, (1799) 3 Esp. 21; *R. v. Holbrook*, (1877) 3 Q.B.D. 60.

2. (1843) 6 & 7 Vict., c. 96; see below, para. 78.

3. (1937) 50 Har. L.R. 730; but not for a remark outside the script interjected without warning by a speaker; (1939) 53 Har. L.R. 143.

4. *Citizens' Life Assurance Co. v. Brown*, (1904) A.C. 423; *Glasgow Corporation v. Lorimer*, (1911) A.C. 209; as to liability of Parliamentary candidates for libels by their agents, see 58 and 59 Vict. c. 40; as to authority given by a speaker to publish his speech in the press, see *Adams v. Kelly*, (1824) Ry. & Moo. 157; *Parkes v. Prescott*, (1869) L.R. 4 Ex. 169.

5. In England, the plaintiff can administer interrogatories to find out the names of the proprietor, printer or publisher and add such persons as parties; 6 & 7 Will; 4 C. 76, S. 19; see *Hillman's Airways, Ltd. v. Societe Anonyme D'Editions Aeronautiques Internationales*, (1934) 2 K.B. 356.

6. *Weld-Blundell v. Stephens*, (1920) A.C. 956; unless the publication amounted to a breach of contract; below, para. 89. See also *Saunders v. Syed*, (1896) 75 L.T. 193; as to contribution and indemnity between joint wrongdoers, see below, Chap. XIX. para. 27.

7. This form was set out in Sch. B, No. 33 of the Common Law Procedure Act, 1852 (15 & 16 Vict., c. 76). See Bullen and Leake, Pleadings and Practice, pp. 343-4. There is no corresponding form in the C.P.C. in India.

(b) malice, except when the defendant pleads and proves privilege or fair comment, (c) damage to reputation. These facts are presumed by law in the plaintiff's favour on proof of publication of a defamatory statement or representation by the defendant. A pleading need not allege facts which are presumed,¹ but these allegations have become traditional. These points require a little explanation.

32. Falsity.—All defamatory words are presumed to be false and it is for the defendant to prove that they are true.²

33. Malice.—The plaintiff has to prove malice to rebut the defence of privilege or fair comment but not in other cases. Where it is necessary, the plaintiff may allege it even by way of reply after the defendant's plea or by way of anticipation in the original plaint itself. But in other cases malice is not an essential ingredient in the cause of action though it may be material in the assessment of damages. The word has, however, persisted in pleadings for centuries.³ It was originally part of the large vocabulary of vituperation which pleaders in former times were in the habit of employing when describing a wrong done to the plaintiff or complainant.⁴ They used to say that the defendant acted maliciously, dishonestly, wickedly and so forth. In prosecutions for libel the word 'malice' obtained a peculiar importance on account of certain adventitious causes in the eighteenth century.⁵ In cases of political libel or sedition, the advocates of popular liberty and right of free speech among whom Erskine was the chief figure, contended for the view that the malicious intent of the accused was the gist of the libel and was for the jury to find.⁶ On the other hand the judges held the view that it was for them to infer malice from the intentional publication of words bearing a libellous sense and the jury had only to decide the fact of publication. This controversy ended finally in favour of the popular view by the passing of Fox's Libel Act, 1792,⁷ which enabled the jury to decide the whole case of libel or no libel. In that way a theory which laid emphasis on malice and malicious intent came to prevail both in the criminal and the civil law of defamation.⁸ In the nineteenth century when the above controversy and the political conditions

1. R.S.C., O. 19, r. 25; C.P.C., O. 6, r. 13; see however Bayley, J., in *Bromage v. Prosser*, (1825) 4 B. & C. 247, 255.

2. As to the reason for the allegation of falsity, see *R. v. Stockdale*, (1789) 22 St. Tr. at p. 298. 3. *R. v. Munslow*, (1895) 1 Q.B. 758; *Allen v. Flood*, (1893) A.C. at p. 37.

4. Holdsworth, Vol. VIII, p. 342. This was also the case with indictments for seditious libel; Stephen, Hist. Crim. Law, Vol. II, p. 354; "Round full-mouthed abuse of people who gave offence to the Government was thought natural and proper."

5. On this subject, see Holdsworth, Vol. VIII, pp. 341 to 346, 371 to 375.

6. See the famous argument of Erskine in the case of the *Dean of St. Asaph* or *R. v. Shipley*, (1784) 4 Dougl. 73; 21 St. Tr. 1043.

7. 32 Geo. III, c. 60.

8. *Smith v. Richardson*, (1737) Willes at p. 24; per Lord Ellenborough in *Maitland v. Goldney*, (1802) 2 East. 426.

of which it was a product had become things of the past, it was time for the true rule to emerge again. It was held in criminal¹ as well as civil cases² that liability for defamation arose not from a malicious intent to defame but from the publication of defamatory works. In *Bromage v. Prosser*,² an action for slander of the plaintiffs, bankers, in the way of their trade, the trial judge directed the jury in accordance with the old view that malice was the gist of the action and the defendant was not liable if he did not speak the words maliciously and out of ill-will. On appeal Bayley, J., held the direction was wrong. He expounded the law in the following well-known passage :—

"Malice in common acceptation means ill-will against a person, but in its legal sense it means a wrongful act, done intentionally, without just cause or excuse. If I give a perfect stranger a blow likely to produce death, I do it of malice, because I do it intentionally and without just cause or excuse....And if I traduce a man, whether I know him or not, and whether I intend to do him an injury or not, I apprehend the law considers it as done of malice, because it is wrongful and intentional. It equally works an injury, whether I meant to produce an injury or not, and if I had no legal excuse for the slander, why is he not to have a remedy against me for the injury it produces? And I apprehend the law recognises the distinction between these two descriptions of malice, malice in fact and malice in law, in actions of slander."

The learned Judge thus laid the old theory to rest, but by introducing another, *viz.*, the theory of 'malice in law.' This is nothing short of a fiction which was apparently intended to keep up a nominal adherence to the old doctrine that malice was the gist of the action and yet to depart from it in substance. The fiction is still maintained in modern cases which state that malice is implied from the publication of defamatory words.³ One cannot help observing that it is a needless fiction and a source of confusion in law.⁴ There is no reason why it should not now be abandoned and malice confined to the sense of improper motive.

34. Damage to reputation.—It is unnecessary also to prove any actual damage to the plaintiff's reputation. The law presumes it from the tendency of the words. It is no defence for instance that the plaintiff was a person of such an established reputation that to call him a liar would do him no harm.

1. *R. v. Harvey*, (1823) 2 B. & C. at pp. 266, 267, per Holroyd, J.

2. *Bromage v. Prosser*, (1825) 4 B. & C. 247, 255.

3. Baron Parke in *Toogood v. Spyring*, (1834) 1 C.M. & R. at 193, Farwell, I. J., in *Hulton v. Jonts*, (1909) 2 K.R. at p. 477, Banks, J., in *Smith v. Streetfall*, (1913) 2 K.R. at pp. 769, 770; Lord Finlay in *Adam v. Ward*, (1917) A.C. 309 at p. 318, and Lord Dunedin at p. 326.

4. Lord Bramwell in *Abrath v. N. E. Ry. Co.*, (1886) 11 A.C. at pp. 253, 254. "That unfortunate word 'malice' has got into cases of actions for libel. We all know that a man may be the publisher of a libel without a particle of malice or improper motive."

35. Defences.—Besides general defences applicable to all torts, like consent,¹ accord and satisfaction,² limitation,³ previous judgment,⁴ etc., there are three special defences under the common law, *viz.*, (i) justification, (ii) privilege, and (iii) fair comment. In England there is a statutory defence⁵ in actions for libel against newspapers, *viz.*, apology.

36. Justification.—'This is the plea of truth of the words published by the defendant. This has been from the first recognised as a good answer in a civil action for defamation. The reason is that in form it was an action on the case in which damage was essential and the law does not recognise any damage arising from the publication of true statements. A person cannot in justice be allowed to get a pecuniary satisfaction for an injury to a reputation which he did not or ought not to possess.⁶ On the other hand libel was treated as a crime because of the insult it conveyed and its consequent tendency to provoke a breach of the peace. As this consequence may follow from true as well as false defamatory statements, truth was not a defence in a criminal prosecution for libel. Indeed the maxim once prevailed, 'the greater the truth, the greater the libel.' Truth is now allowed as a defence if the publication is for the public interest.⁷ In a civil action the defendant has to plead and prove the truth of the defamatory words and not merely his belief in their truth, though honest. If the words are true, he escapes liability however improper his motives may have been.

37. Form of the plea of justification.—The form of the plea is that "the words complained of are true in substance and in fact." If the defendant had repeated a rumour or another's words (*e.g.*, that A told him that B was insolvent), he must plead that the defamatory imputation (*i.e.*, the insolvency) is true and not merely that A told him so or that there was such a rumour.⁸ When however the defendant was privileged in repeating another's words, as where he published in his newspaper a report of a

1. See *Monson v. Tussauds*, (1894) 1 Q.B. 671; *Hopwood v. Thorn*, (1849) 8 C.B. 293; *Hope v. F'Anson*, (1901) 18 T.L.R. 201; *Raid v. Blisland School Board*, (1901) 17 T.L.R. 626; *Duke of Brunswick v. Harmer*, (1849) 14 Q.B. 185.

2. *Lane v. Applegate*, (1815) 1 Stark. 49 (the defendant burnt all the defamatory papers on the plaintiff agreeing not to sue if that was done); *Boorey v. Wood*, (1865) 3 H. & C. 484 (acceptance of mutual apologies). 3. Below, Chap. XIX, para. 36.

4. A previous judgment against one will not bar an action against another joint libeller if the cause of action was distinct, *e.g.*, proprietor of a newspaper and author of a letter published by it; *Frescoes v. May*, (1860) 2 F. & F. 123. See below, Chap. XIX, para. 26.

5. Under the Libel Act, 1843, 6 & 7 Vict. c. 96, s. 2; below, para. 78.

6. Per Littledale, J., in *M'Pherson v. Daniels*, (1829) 10 B. & C. at p. 272.

7. In England, the Libel Act, 1843, 6 & 7 Vict. c. 96, s. 6; in India, I.P.C., s. 499, first exception. A similar rule is applied also to civil actions in some States in the U. S. A.; and relief is also given there against publication of a true statement if it amounts to an invasion of a right of privacy; below, Chap. XII, para. 12.

8. *Watkin v. Hall*, (1868) L.R. 3 Q.B. 396; *M'Pherson v. Daniels*, (1829) 10 B. & C. 263; *Davison v. Duncan*, (1857) 7 E. & B. 229; *Cookson v. Harwood*, (1932) 2 K.B. 478, 485.

judicial proceeding, the plea need allege only the truth of the report. Where the words complained of amount to a specific statement of fact (*e.g.*, the plaintiff stole a watch yesterday in the defendant's premises) it is enough to plead that the said words are true. He need not state more in his plea. But if, as so often is the case, the words convey a general charge (*e.g.*, the plaintiff is a swindler or pickpocket), it is not enough to plead merely that the said words are true, but the defendant must give particulars of facts on which the charge is based and plead that those facts are true.¹ A bare assertion of the truth of the words is a repetition of the libel and not a justification of it.² The plaintiff must know what case he has to meet and cannot be expected to come to the trial prepared to justify his whole life.³ The particulars must be precise; for instance, if fraud is alleged, the occasions and persons with reference to whom the plaintiff committed fraud must be specified.⁴ The defendant cannot refuse to furnish particulars on the ground that he will thereby disclose his evidence or the names of his witnesses⁵. They must also be relevant to the imputation conveyed by the words. For instance, if the defendant said that the plaintiff committed some specific act, a plea that the plaintiff committed some other act will be bad.⁶ If however the imputation is of general misconduct or bad character, the defendant may allege all facts on which he proposes to rely at the trial.⁷ The plea must be as broad as the libel *i.e.*, not merely the literal language but also the inferences which naturally follow from it, and must not fall short of it.⁸ Where the plaintiff, a proctor, was alleged to have been thrice suspended, a plea that he was once suspended was held bad.⁹ Where the plaintiffs were called "nothing but thieves and scoundrels," and the defendant alleged in his particulars facts which at the most amounted only to political dishonesty on the part of plaintiffs to serve their own ends, it was held that the particulars were irrelevant.¹⁰ If the plaintiff relies on an innuendo, the

1 *Wotton v. Sievier*, (1913) 3 K. B. 499; *Arnold v. Bottomley*, (1908) 2 K. B. 151; *Zierenberg v. Labouchere*, (1893) 2 Q. B. 183, *cf.* *Marks v. Wilson-Royd*, (1939) 2 A.E.R. 605 C.A. where the charges being specific, particulars were refused.

2 *Per* Kay, J., in *Zierenberg v. Labouchere*, (1893) 2 Q. B. at p. 189.

3 *Per* Ashhurst, J., in *l'Anson v. Stuart*, (1787) 1 T. R. at 752.

4 *Alderson, B.* in *Hickinbotham v. Leach*, (1842) 10 M. & W. 361, 363; *Zierenberg v. Labouchere*, (1893) 2 Q. B. at p. 187; *Markham v. Wernher Beit & Co.*, (1902) 18 T.L.R. at p. 764; *Khariduddin v. Tara Singh*, (1926) I.L.R. 7 Lah. 491.

5 *Wotton v. Sievier*, (1913) 2 K. B. 499; *Zierenberg v. Labouchere*, (1893) 2 Q. B. 183. He cannot have a discovery or interrogatories before he states the particulars; *Metropolitan Saloon Omnibus Co. v. Hawkins*, (1879) 4 H. & N. 146; *Gourley v. Plimsoil*, (1873) L.R. 8 C. P. 362; *Goldschmidt v. Constable & Co.*, (1937) 4 A.E.R. 293.

6 *Maisel v. Financial Times, Ltd.*, (1915) 3 K.B. 336; see *Sutherland v. Stokes*, (1926) A.C. at p. 79, *per* Lord Shaw, *Weaver v. Lloyd*, (1824) 2 B. & C. 678.

7 *Maisel v. Financial Times*, above; *Mac Grath v. A. & C. Black, Ltd.*, (1926) 95 L.J.K.B. 951; *Godman v. Times Publishing Co.*, (1926) 2 K. B. 273.

8 *O'Brien v. Bryant*, (1846) 16 M. & W. 168; *Bishop v. Latimer*, (1861) 4 L.T.N.S.

775.

9 *Clarkson v. Larson*, (1829) 6 Bing. 266.

Wernher Beit & Co. v. Markham, (1901) 18 T.L.R. 143; on appeal, *ibid.*, p. 763.

defendant must plead the truth of the words both in their natural and alleged special meaning. If he pleads merely that the words are true in their natural sense and are not capable of the special sense, then he cannot offer to prove the truth of the special sense if the innuendo is held proved. If he simply says the words are true without referring to the innuendo he will have to prove the truth of any special meaning of which the words are held capable.¹ The defendant may plead the truth of some of the statements if they are severable from the rest but not otherwise.²

38. Proof of justification.—The evidence must be confined to the facts alleged in the plea or the particulars and must establish that the words complained of are substantially true. As much must be justified as meets the sting of the charge.³ If this is done, it does not matter that on some unimportant or immaterial details the statement complained of is incorrect, as where a person was said to have been convicted and sentenced to three weeks' instead of a fortnight's imprisonment.⁴ Where however it is an exaggerated statement the defence fails, *e.g.*, where the plaintiff was called a libellous journalist when he was only on one occasion sued and made to pay damages for libel.⁵ If the defendant proves the main allegations or the sting of the charge, he need not separately justify statements which are only shadows of the main one and not distinct imputations. In *Sutherland v. Stokes*⁶ where the defendant wrote of the plaintiff that she was instructing working women in contraceptive methods which had been pronounced as "most harmful," it was held on proof that some of these methods were harmful, that the further statements that "it was amazing that this monstrous campaign of birth-control should be tolerated by the Home Secretary, and that Charles Bradlaugh was condemned to jail for a less serious offence," did not require any separate proof. It would be otherwise if the statement not justified is a distinct imputation.⁷ Where the words contain comments it will be safer for the defendant to add the plea of fair comment. A charge of a crime must be proved beyond reasonable doubt as if the plaintiff were

1. *Watkin v. Hall*, (1861) L.R. 3 Q.B. 396, *Brembridge v. Latimer*, (1864) 12 W.R. 878; *Wood v. Earl of Durham*, (1888) 4 F.L.R. 556

2. *Fleming v. Dollar*, (1889) 23 Q.B.D. 388, *Clarke v. Taylor*, (1836) 2 Bing. (N.C.) 654, he can pay money into court in respect of the libels not justified.

3. *Per Burroughs, J.*, in *Edwards v. Bell*, (1824) 1 Bing. at p. 409. As to right of defendant to deliver interrogatories to plaintiff to establish latter's unchastity, see *Blunt v. Park Lane Hotel Ltd.*, (1942) 2 K.B. 253 C.A.

4. *Alexander v. N. E. Ry. Co.*, (1865) 6 B. & S. 340, cf. *Gwynn v. S. E. Ry. Co.*, (1868) 18 L.T. 738.

5. *Wakley v. Cooke*, (1849) 4 Ex. 511; cf. *Leyman v. Latimer*, (1877) 3 Ex. D. 15; ('Felon Editor').

6. (1925) A.C. 47; see also *Morrison v. Harmer*, (1837) 3 Bing. N.C. 799; *Clarke v. Taylor*, (1836) 2 Bing. N.C. 654; *Cooper v. Lawson*, (1838) 8 A. & E. 746.

7. *Edwards v. Bell*, (1824) 1 Bing. 403.

on his trial. The fact that the plaintiff has been convicted of it is *prima facie* evidence of his guilt.¹ The fact that he had been acquitted will not stand in the way of the defendant proving the charge though the task will be a difficult one.² The question whether the defendant has proved the truth of the words is one of fact depending on the circumstances of the case.³ In England it is for the jury to decide. The plea of justification should be taken and settled with great care, as failure to prove it generally aggravates damages.⁴

39. Privilege.—Privilege is used here* in the sense of an excuse or immunity conferred by law on statements or communications made on certain occasions called "privileged occasions." These are occasions when a person has a duty or interest in making certain statements to some person or persons having a corresponding duty or interest.* A statement made on such an occasion and warranted by it is privileged, because in the public interest the law considers that a person acting from a sense of duty or interest should do so without fear of being called upon to prove the truth of his words in a court of law. There are two kinds of privilege, absolute and qualified. In the former case the occasion is such that the law raises a conclusive presumption that he makes the statement from a sense of duty. No action will lie against him on the ground that he was actuated by malice, *i.e.*, a motive other than a sense of right or duty in making the statement. The reason is that persons in such situations, like a judge deciding a cause or a party or advocate pleading it, are helping public justice and they should discharge their respective functions without fear of an enquiry in a court of law into the question whether they acted honestly or abused the occasion for the purpose of injuring another's reputation. The rule may work injustice occasionally by allowing malicious persons to escape; but to expose judges, advocates, and parties to the risk of such an enquiry would be a greater evil to public interests.⁷ The privilege is not a private or personal right of the individual to defame but is a protection

1. *Re Crippen*, (1911) P. 108, 115; *Mush v. Darlev*, (1914) . . .

2. *England v. Bourke*, (1810) 3 Esp. 80.

3. For instances, see cases in p. 275 notes 3 to 6, above, and also *Ingram v. Lawson*, (1838) 5 Bing. N.C. 66; *Edsall v. Russell*, (1842) 4 M. & G. 1090; *Botterill v. Whytehead*, (1879) 41 L.T. 588; *Maisel v. Financial Times*, (1915) 3 K.B. 336; *Smith v. Parker*, (1844) 13 M. & W. 459.

4. *Warwick v. Foulkes*, (1844) 12 M. & W. 507; *Wilson v. Robinson*, (1845) 7 Q.B. 68; *Simpson v. Robinson*, (1818) 12 Q.B. 511; *Caulfield v. Whitworth*, (1868) 18 L.T.N.S. 527; *Peters v. Bradlaugh*, (1884) 4 T.L.R. 467; *Khariduddin v. Tara Singh*, (1926) I.L.R. 7 Lah. 491.

5. In other parts of the law it is used in the sense of a private right or advantage *e.g.*, a franchise, an easement or servitude; Stroud, *Judicial Dictionary*, Vol. 3.

6. *Adam v. Ward*, (1917) A.C. 309 at pp. 334, 345, per Lord Atkinson.

7. *Munster v. Lamb*, (1883) 11 Q.B.D. 588 at pp. 603, 604, per Brett, M.R.; see also *Rodrigues v. Speyer Brothers*, (1919) A.C. 59 at p. 91, per Lord Atkinson.

conferred on him for public benefit.¹ In the case of qualified privilege, the demands of public policy are not so high but require only that the person making a statement on a privileged occasion should be protected from liability so long as he is not proved to have acted from an improper motive. For instance a person giving information about his former servant to an intending employer or about a crime to the police is protected from liability though his words may be defamatory, provided he acted honestly in the discharge of a social or moral duty to give such information. He loses the protection if he knew his statement to be false or abused the privilege for some improper purpose. In other words, the difference between absolute and qualified privilege is that the former is not, while the latter is negated by proof of malice.

40. Absolute privilege.—There are three cases of absolute privilege recognised by the common law²: (a) statements made in the course of Parliamentary proceedings, (b) statements made in the course of judicial proceedings and (c) statements relating to affairs of State.

41. Parliamentary proceedings.—Speeches made in both Houses of Parliament,³ proceedings before their committees,⁴ and petitions to Parliament are absolutely privileged; but not statements made by a member outside Parliament,⁵ or in the lobbies, or smoking room, or by a stranger in the visitors' gallery, or a report published outside of a speech inside Parliament.⁶ In India an absolute privilege is conferred by the Government of India Act, 1935,⁷ on speeches and votes in the federal and provincial legislatures and on official reports of their proceedings. This privilege extends to a question asked by a member of a legislative assembly.⁸ There is no absolute privilege in the case of proceedings before inferior public bodies like county councils or local boards.⁹

1. *Bottomley v. Brougham*, (1908) 1 K.B. 584 at p. 587, per Channell, J.

2. The courts have refused to add to them, *Stevens v. Sampson*, (1879) 5 Ex D. 53; *Royal Aquarium v. Parkinson*, (1892) 1 Q.B. at p. 431; when the facts set out in the plaint disclose absolute privilege, the defendant may move that the suit be dismissed; *Law v. Llewellyn*, (1906) 1 K.B. 437; *Burr v. Smith*, (1909) 2 K.B. 306. The plea may be allowed for the first time in appeal; *Madhab Chandra v. Nirod Chandra*, I.L.R. (1939) 1 Cal. 574; 1939 Cal. 477.

3. *Ex-parte, Wason*, (1869) L.R. 4 Q.B. 573, 576, per Cockburn, C.J.; *Dillon v. Balfour*, (1887) 20 L.R. Ir. 600, for the history of this privilege, see Thomas, Cases on Constitutional Law, p. 36.

4. *Goffin v. Donnelly*, (1881) 6 Q.B.D. 307.

5. *Wernher, Beit & Co. v. Markham*, (1907) 18 T.L.R. 763

6. *R. v. Abingdon*, (1794) 1 Esp. 226; *R. v. Greevey*, (1813) 1 M. & S. 273.

7. 26 Geo 5, c. 11, ss. 28, 71. For a similar privilege in American and Colonial legislatures, see Cooley, Torts, p. 430; Gatley, p. 209.

8. *Khin Maung v. Au Eu Wa*, (1936) I.L.R. 14 Rang. 420 (F.B.).

9. *Pittard v. Oliver*, (1891) 1 Q.B. 474; *Royal Aquarium v. Parkinson*, (1892) 1 Q.B. 431.

42. Judicial proceedings.—The privilege extends to statements made by the following persons :—

(a) **Judges.**—The privilege is allowed in England¹ and in India² to judges, magistrates, and other persons exercising judicial functions. There is no absolute privilege for persons discharging administrative duties, *e.g.*, the London County Council sitting as a licensing authority for the grant of music and dancing licences.³ But they may have a qualified privilege. There is also no absolute privilege in the case of a domestic tribunal, *e.g.*, arbitrators constituted by consent of parties,⁴ the stewards of a jockey club enquiring into the alleged misconduct at a race-meeting.⁵

(b) **Jurors.**—The privilege of a juror is of the same kind as that of a judge.⁶

(c) **Parties, advocates and witnesses.**—These persons have an absolute privilege under the common law of England.⁷ The same rule has

1. To judges of superior courts; *Fray v. Blackburn*, (1863) 3 B. & S. 576; and to those of inferior courts also; *Scott v. Stansfield*, (1868) L.R. 3 Ex. 220. See also *Hamond v. Howell*, (1689) 2 Mod. 218 (Recorder of London); *Ryalis v. Leader*, (1865) L.R. 1 Ex. 296 (County Court Judge sitting in Bankruptcy); *Thomas v. Churton*, (1862) 2 B. & S. 475 (Coroner); *Pedley v. Morris*, (1891) 65 L.T. 526 (the Master of the Supreme Court); *Barratt v. Kearns*, (1905) 1 K.B. 504 (ecclesiastical commission); *Bottomley v. Brougham* (1908) 1 K.B. 584; *Burr v. Smith*, (1909) 2 K.B. 306 (Official Receiver); *Dawkins v. Lord Rokeby*, (1875) L.R. 7 H.L. 744; *Co-partnership Farms v. Harvey Smith*, (1918) 2 K.B. 405 (military tribunal); see also *Hodson v. Pare*, (1899) 1 Q.B. at p. 458; *R. v. Crossley*, (1909) 1 K.B. 411; *Lilley v. Roney*, (1892) 61 L.J.Q.B. 727.

2. *Ram Nayar v. Subramanya*, (1893) I.L.R. 17 Mad. 87; *Jagannath v. Rafar Ali*, 1934 All. 827; 1934 A.L.J. 1173. A registration officer is not a judicial officer; *Krishnammal v. Krishna Ayyangar*, (1912) 23 M.L.J. 50; 15 I.C. 652; *Hem Chandra v. Tarepada*, (1935) 40 C.W.N. 500 (President of a Union Bench); see also *Duraiswami v. Lakshmanan*, 1933 Mad. 537 (an officer under s. 75, Madras Estates Land Act is a judicial officer).

3. *Royal Aquarium v. Parkinson*, (1892) 1 Q.B. 431; see also *Boulter v. Kent Justices*, (1897) A.C. 556; *Attwood v. Chapman*, (1914) 3 K.B. 275 (licensing justices); *Collins v. Henry Whiteaway & Co.*, (1927) 2 K.B. 378 (Court of Referees under the Unemployment Insurance Act); as to which see *Mason v. Brewis Bros.*, (1938) 2 A.E.R. 420; *Little v. Pomeroy*, (1873) Ir. R. 7 C.L. 50 (a grand jury sitting for fiscal purposes); *O'Connor v. Waldron*, (1935) A.C. 76 (a Commissioner under the Combines Investigation Act, Canada).

4. *Per Fry, L.J.*, in (1892) 1 Q.B. at p. 447.

5. *Hope v. F. Anson*, (1901) 18 T.L.R. 201.

6. *R. v. Skinner*, (1772) Loft. 55, *per* Lord Mansfield, C.J.

7. **Parties.**—*Astley v. Younge*, (1759) 2 Burr. 807; *Revis v. Smith*, (1856) 18 C.B. 126; *Henderson v. Broomhead*, (1859) 4 H. & N. 569; *Gompas v. White*, (1890) 54 J. P. 22; *Lilley v. Roney*, (1892) 8 T. L. R. 642. **Advocates.**—*Munster v. Lamb*, (1883) 11 Q. B. D. 588. **Witnesses.**—*Dawkins v. Lord Rokeby*, (1873) L.R. 7 H.L. 744; *Seaman v. Netherclift*, (1876) 1 C.P.D. 540 and 2 C.P.D. 53; *Beresford v. White*, (1914) 30 T.L.R. 591; *Hope v. Leng*, (1907) 23 T. L. R. 243; *Goffin v. Donnelly*, (1881) 6 Q. B. D. 307; *Revis v. Smith*, (1856) 18 C.B. 126.

been applied in India in civil actions.¹ In criminal prosecutions, however, only a qualified privilege is allowed by the Indian Penal Code.² The privilege of a party applies to his pleading, petition, affidavit, or complaint,³ and also to documents produced by him to support his case.⁴ The privilege of an advocate is in respect of his questions to a witness and words spoken in the conduct of the case. The privilege of a witness has been held to extend not merely to his evidence in court but also to the proof of evidence given by him to the party and the solicitor before he gave his evidence in court, because, it was said, the protection conferred on him could be nullified by suing him for slander not in respect of what he said in court but what he told the solicitor that he intended to say there.⁵ On the same principle the Madras High Court held that the statement made by a person in his complaint to a magistrate and repeated by him to a police officer to whom the magistrate referred his complaint for report was absolutely privileged as it was preparatory to the evidence in court.⁶ But a communication by a person to his lawyer for giving a notice has only a qualified privilege.⁷

1. Parties.—*Hindusthan Gilt Jewel Works v. Gangayya*, I.L.R. 1943 Mad. 685; (1943) 1 M.L.J. 186; *Chunni Lal v. Narsingh*, (1917) I.L.R. 40 All. 341; 16 A.L.J. 360; *Satishchandra v. Ram Doyal*, (1920) I.L.R. 48 Cal. 388; 24 C.W.N. 982; *Crowdy v. Reilly*, (1912) 17 C.L.J. 105; 18 I.C. 737; *Madhab Chandra Ghose v. Nirod Chandra*, I.L.R. (1939) 1 Cal. 574; 1939 Cal. 477; *Ma Myu Shwe v. Maung*, (1924) I.L.R. 2 Rang. 333; *Mahamed v. Manna Lal*, 1929 All. 755; *Ramkirat v. Biserwar Nath*, (1932) I.L.R. 11 Pat. 693; cf. *Dinshaw v. Jehingir*, (1922) I.L.R. 47 Bom. 15; 24 Bom. L.R. 400; *Brijlal v. Mahant*, I.L.R. 1940 Nag. 48; 1940 Nag. 125. The above cases have departed from the older view that qualified privilege enacted by the Penal Code applied to civil actions; see however, *Dhiro Koch v. Gobind*, (1921) 65 I.C. 294 (Cal.) Advocates.—*Sullivan v. Norton*, (1886) I.L.R. 10 Mad. 28 (F.B.); *Nanabhai v. Wadi*, (1899) 2 Bom. L.R. 3 (F.B.); *Padmarasu v. Venkataramana*, (1908) 19 M.L.J. 217, 219; 1 I.C. 799; *Sivakumar Devi v. Bacharam*, (1921) 25 C.W.N. 835; 1921 Cal. 525; *Jagat Mohan v. Kalipado*, (1932) I.L.R. 1 Pat. 371. Witnesses.—*Babu Gunesi Dutt v. Muggeram*, (1872) 11 B.L.R. 321 (P.C.); *Adivaramma v. Ramachandra*, (1909) 21 M.L.J. 85; 6 I.C. 309; *Nannu Mal v. Prasad*, 1926 All. 672.

2. *Bai Shanta v. Umrao*, (1925) I.L.R. 50 Bom. 162; 28 Bom. L.R. 1; *Tulsidas v. Billimoria*, (1932) 34 Bom. L.R. 910; 1932 Bom. 490; *McDonnell v. R.*, (1925) I.L.R. 3 Rang. 524; *Nirsu v. R.*, 1926 Pat. 499; *Thiruvengada v. Tripurasundari*, (1926) I.L.R. 49 Mad. 728; 51 M.L.J. 112; *Banerjee v. Anukul*, (1927) I.L.R. 55 Cal. 85.

3. But not a complaint to a police officer; *Joseph Maye v. Charles Warwick*, (1943) 47 C.W.N. 627; *Dil Sukh Ram v. Gundan Lal*, (1942) A.L.W. 696; see, however, *Bapalal Co. v. Krishnaswamy*, (1940) 2 M.L.J. 556 *contra*.

4. *Hanumantha Row v. Seetaramayya*, 1942 Mad. 343.

5. *Watson v. M'Ewan*, (1905) A.C. 480.

6. *Sanjivi v. Koneri*, (1925) I.L.R. 49 Mad. 215; see also *Madhab Chandra v. Nirod Chandra*, I.L.R. (1939) 1 Cal. 574; 1939 Cal. 477; as to *Bapalal Co. v. Krishnaswami*, (1940) 2 M.L.J. 555, see note 3 above; *contra*, *Mohamad Samiullah Khan v. Bishu Nath*, (1927) 26 A.L.J. 760; 1928 All. 316.

7. *Balammal v. Palani Naidu*, (1936) 46 L.W. 932; (1937) M.W.N. 1108; *More v. Weaver*, (1928) 2 K.B. 520 held *contra* but was doubted in *Minter v. Priest*, (1930) A.C. 558, 570, 574.

(d) **Officers of court.**—Officers of court may have a duty to report in the course of a judicial proceeding. For instance, the report of an Official Receiver under the Companies Act¹ or a police-officer to whom a complaint is referred by a magistrate² would have an absolute privilege.

The privilege exists in the above cases only if the statements are made in the course of judicial proceedings. There must be a proceeding before a judicial and not merely an administrative officer. The statement must relate or have reference to a proceeding in court or in judge's chambers or elsewhere, whether *ex-parte* or otherwise. But there is no privilege for a statement made by one who has no business to speak in court,³ or by a judge or witness on a matter unconnected with any judicial proceeding,⁴ or for a letter written to a judge before the case is taken up.⁵ The statement need not however be relevant to the proceeding in the technical sense of the term in the law of evidence.⁶

43. Statements relating to affairs of State.—The privilege in this case is incident to the general defence to be discussed later, *viz.*, authority of executive and military officers.⁷ A censure of a deputy collector by means of a Government notification was held privileged.⁸ An action for libel in respect of a document relating to an affair of State may fail also on the ground that it is privileged from production in a court of law.⁹

44. Reports having absolute privilege.—An absolute privilege is conferred by statute on the following reports on account of the great public advantage of giving publicity to the proceedings or events reported.

(a) **Official reports of proceedings of Parliament and the Indian Legislatures.**—By a statute of 1810,¹⁰ reports published by order of

1. Above, p. 279, note 1.

2. *Veni Madho Prasad v. Wajid Ali*, 1937 All. 90. The Court regarded it as also an official communication entitled to absolute privilege.

3. *Delegal v. Highley*, (1837) 3 Bing. N.C. 950; *Dawon Singh v. Mahipsingh*, (1898) I.L.R. 10 All. 425, 454; *Hayes v. Christian*, (1892) 15 Mad. 414; 2 M.L.J. 142; *Girwar v. Siroman*, (1905) I.L.R. 32 Cal. 1060; 9 C.W.N. 847. Below, p. 282, note 4.

4. *Paries v. Levy*, (1869) 9 C.B.N.S. 342; *Seaman v. Netherclift*, (1876) 1 C.P.D. 540 at p. 547; 2 C.P.D. at pp. 56, 67; *Hope v. Leng*, (1907) 23 T.L.R. 243; *Vsal v. Heard*, (1930) 46 T.L.R. 448; *Rahim Baksh v. Butcha Lal*, (1928) I.L.R. 51 All. 509; *Jivan Mal v. Lashman*, 1925 Lah. 486.

5. *Gould v. Hulme*, (1829) 3 C. & P. 625.

6. *Adivaramma v. Ramachandra*, (1909) 21 M.L.J. 85; 6 I.C. 309.

7. *Dawkins v. Lord Paulet*, (1869) L.R. 5 Q.B. 94; *Isaacs & Sons v. Cook*, (1925) 2 K.B. 391.

8. *Jehangir v. Secretary of State for India in Council*, (1904) I.L.R. 27 Bom. 189; 5 Bom. L.R. 30; in appeal, 6 Bom. L.R. 131; see also *Ross v. Secretary of State for India*, (1913) I.L.R. 37 Mad. 55; 24 M.L.J. 429.

9. See Indian Evidence Act, S. 123, 124. See *Chatterton v. Secretary of State for India*, (1895) 2 Q.B. 189; also *Grant v. Secretary of State for India*, (1877) 2 C.P.D. 445; *Isaacs & Sons v. Cook*, (1925) 2 K.B. 391.

10. Parliamentary Papers Act, 1840 (3 & 4 Vict., c. 9); extracts and abstracts therefrom have a qualified privilege. There is no privilege for headlines; *Mungen v. Lloyd*, (1908) 25 T.L.R. 26.

Parliament and all verified copies thereof obtained this privilege. The statute was the result of the famous case of *Stockdale v. Hansard*,¹ where the decision of the judges against the privilege resulted in a serious conflict between them and Parliament.² In India, the Government of India Act, 1935,³ confers an absolute privilege on reports of proceedings of the Legislatures, federal and provincial, published by or under their authority. It is interesting to note that a rule which does not attract any special notice at the present day had a stormy history behind it in England.

(b) **Newspaper reports of judicial proceedings.**—In England under the Law of Libel Amendment Act, 1888,⁴ a fair and accurate report in any newspaper of proceedings publicly heard before a court exercising judicial authority shall, if published contemporaneously with such proceedings, be privileged; but this does not authorise the publication of any blasphemous or indecent matter. Under the common law, reports of judicial proceedings whether in a newspaper or otherwise have a qualified privilege. This statute confers a higher privilege on contemporaneous reports in 'newspapers' as defined therein, i.e., those published at intervals not exceeding twenty-six days.⁵ A report not falling within that definition, e.g., in a monthly magazine or a law journal or one published in a newspaper sometime later than the event reported will have only a qualified privilege under the common law. In the absence of any similar legislation in India reports of judicial proceedings in newspapers or elsewhere have only a qualified privilege.

45. Qualified privilege.—There are two categories under this head, viz., privileged reports and privileged communications. The following reports have a qualified privilege under the common law on the principle that a person has the right to publish for public information that which it is fit and proper for the public to know.⁶

46. Reports of judicial proceedings.—Publication of fair and accurate reports of judicial proceedings is privileged because it is to the public advantage and helps the administration of justice⁷; it "enlarges the

1. (1839) 9 A. & E. 1.

2. For an account of it, see Life of Lord Campbell, Vol. II, pp. 112, 129; May, Constitutional History of England, Vol. I, pp. 360-363; *Wason v. Walter*, (1868) L.R. 4 Q.B. 73, 86, per Cockburn, C.J.

3. Ss. 28 (1), and 71 (1). See also the G.I. Act 1919, 9 & 10 Geo. 5, c. 101, Ss. 11 (7) and 24 (7).

4. 51 & 52 Vict., c. 64, S. 3.

5. Gatlley, p. 351; Fraser, Libel & Slander, p. 198; Spencer Bower, pp. 406, 407; see *contra*, Odgers, Libel & Slander, p. 268.

6. *Cox v. Feeney*, (1863) 4 F. & F. 13, 19; see also *Plint v. Pike*, (1825) 4 B. & C. 473, 480.

7. *Kimber v. The Press Association*, (1893) 1 Q. B. 65, 68; *MacDougall v. Knight*, (1889) 14 A. C. at p. 200; 17 Q. B. D. at p. 638; 25 Q. B. D. 1.

area of the court and inform all that have a right to know."¹ The privilege belongs not only to newspapers but also to any other publication. The following points may be noted :—

(a) The report should be of judicial proceedings that took place in open court or a place open to the public.² Events that took place in private (*e.g.*, in the judge's private room) or *in camera*, or were unfit for or prohibited from publication (*e.g.*, obscene or indecent matter,³) should not be reported; nor events which are unconnected with the proceedings *e.g.*, an unauthorised observation of a bystander,⁴ or of the clerk of the court in a matter in which he was not called upon to speak.⁵ A report can be made of proceedings of an *ex parte* or preliminary inquiry,⁶ of proceedings as they go on from day to day and not only of concluded events,⁷ of depositions, speeches of counsel, observations made by judge, witness, or counsel in the course of the case,⁸ of pleadings, affidavits, judgments and other records of court open to public inspection like a register of judgments or decrees.⁹

(b) The report must be fair and accurate, *i.e.*, a substantially faithful report.¹⁰ It need not be verbatim but may be a fair abstract or summary. A report of part of the proceedings alone, *e.g.*, the arguments of one of the counsel or the evidence of some of the witnesses may make the report unfair.¹¹

1. *Per* Lord Campbell in *Andrews v. Chapman*, (1853) 3 C. & K. at p. 289. The privilege however is of modern growth, and was developed by decisions of the 19th century; *Wason v. Walter*, (1863) L. R. 4 Q. B. at p. 94.

2. *Smith v. Scott*, (1847) 2 C. & K. 580; *Ryalls v. Leader*, (1865) L. R. 1 Ex. 296.

3. See the Judicial Proceedings (Regulation of Reports) Act, 1926, 16 and 17 Geo. 5. c. 61.

4. *Lynam v. Gowing*, (1880) 6 L.R. Ir. 259; see also *Lewis v. Levy*, (1858) E.B. & E. 537; cf. *Farmer v. Hyde*, (1937) 1 K.B. 728 (during the hearing of a libel action in which the plaintiff, Farmer, had been the only witness who had deposed, one Mr. Davidson, who was once the Rector of Stiffkey and removed for immoral practices, and who was neither a witness nor a party got up and asked the Court if he could contradict the many lies that had been told. The plaintiff sued a number of newspaper who had reported also this interjection. Held that it was in the course of the proceedings and privileged.).

5. *Delegal v. Highley*, (1837) 3 Bing. N.C. 950

6. *Usill v. Hales*, (1878) 3 C.P.D. 319 *Kimber v. The Press Association*, (1893) 1 Q.B. 65. These overrule a number of older cases to the contrary.

7. *Lewis v. Levy*, (1858) E.B. & E. 537, *per* Lord Campbell, C.J.

8. *Hope v. Leng*, (1907) 23 T.L.R. 243

9. *Searles v. Scarlett*, (1892) 2 Q.B. 56.

10. For illustrations, see *Mitchell v. Hirst, etc., Ltd.*, (1936) 3 A.E.R. 872; also *Saunders v. Mills*, (1829) 6 Bing. 213; *Lewis v. Walter*, (1821) 4 B. & Ald. 605; *MacDougall v. Knight*, (1819) 14 A.C. at p. 230; (1890) 25 Q.B.D. 1; *Hayward v. Hayward*, (1886) 34 Ch.D. 198; *Grimwade v. Dicks*, (1886) 2 T.L.R. 627; *Woodgate v. Ridout*, (1865) 4 F. & F. 202; *Chalmers v. Puyne*, (1835) 2 C.M. & R. 156; *Ashmore v. Borthwick*, (1885) 2 T.L.R. 113, 209.

11. *Reg. v. Andrew Gray*, (1861) 26 J. P. 663; *Saunders v. Mills*, (1829) 6 Bing. 213.

A report of a judgment alone may be fair; *MacDougall v. Knight*, (1890) L.R. 25 Q.B.D. p. 1 and in 17 Q.B.D. at p. 640, *per* Lord Esher. See however Lord Halsbury, in 14 A.C. at p. 200; *Searles v. Scarlett*, (1892) 2 Q.B. 56 (register of judgments in a county court); *Furniss v. Cambridge Daily News*, (1907) 23 T.L.R. 705 (report of charge-sheet not a record of court but made for police purposes, held not privileged).

Again a report should appear distinct from comment; if they are inseparably mixed, there is no privilege.¹ Unfair comments may make the report also unfair and may evidence malice; *e.g.*, sensational head-lines like 'Judicial Delinquencies,'² 'Wilful and Corrupt Perjury,'³ 'An Honest Lawyer.'⁴ Any comment on pending proceedings may amount also to a contempt of court.⁵ It is for the defendant to show that the report is fair;⁶ if he fails, he has no privilege though he may have acted in good faith.⁷

(c) The proceedings may be before a court of law or any other tribunal acting judicially⁸ and acting within the scope of its jurisdiction. But the fact that the court held that it had no jurisdiction will not take away the privilege of the proceedings.⁹

(d) The plaintiff may prove malice. It may be inferred from the circumstances, *e.g.*, a belated report, publication in the form of a pamphlet or circular,¹⁰ repetition of the same report, printing it in a special type, unfair comments or head-lines. Where a newspaper publishes a fair report in the usual course of business, the fact that there was malice in the reporter who was under a duty to report and in the position of a mechanical agent for the purpose will not take away the privilege of the newspaper or even of the reporter.¹¹ But when a private person sends a report to a newspaper assuming the role of a reporter for that purpose, his malice will destroy the privilege of the newspaper and his own.¹²

47. Reports of Parliamentary proceedings.—Fair and accurate reports of Parliamentary proceedings are privileged. In the leading case of *Wason v. Walter*,¹³ where a report in the *London Times* of a Parliamentary debate was held privileged, Cockburn, C.J., observed that such reports were privileged for the same reasons as reports of judicial proceedings and were "essential to the working of the Parliamentary system and to the welfare of the nation." This decision gave authoritative sanction to the right of

1. *Stiles v. Nokes*, (1806) 7 East. 493.

2. *Ibid.*

3. *Lewis v. Levy*, above.

4. *Bishop v. Latimer*, (1861) 4 L.T. 775.

5. *Littler v. Thomson*, (1839) 2 Beav. 129; *Higgins v. Richards*, (1912) 28 T.L.R. 202; *R. v. Gray*, (1865) 10 Cox C. C. 184; *R. v. Payne*, (1896) 1 Q. B. 577; *R. v. Davies*, (1906) 1 K.B. 32; *Dunn v. Bevan*, (1922) 1 Ch. 276.

6. See *per* Lord Esher, in *Kimber v. The Press Association*, (1893) 1 Q.B. 65, 71.

7. *Blackburn v. Blackburn*, (1827) 4 Bing. 395; *Blake v. Stevens*, (1864) 4 F. & F. 232; *Huntley v. Ward*, (1859) 6 C.B. (N.S.) 514.

8. See above, para. 42.

9. *Usill v. Hales*, (1878) 3 C.P.D. 319.

10. *Salmon v. Isaac*, (1869) 20 L.T. 885.

11. *Stevens v. Sampson*, (1879) 5 Ex. D. 53 at p. 56, *per* Bramwell, L.J.; see *Adam v. Ward*, (1917) A.C. 301. Mere receipt of money by the editor for insertion of a report is not evidence of malice; *per* Farwell, L.J., in *Dawson v. Dover and County Chronicle*, (1913) 108 L.T. at p. 484.

12. *Stevens v. Sampson*, above.

13. (1868) L.R. 4 Q.B. 73; see also *R. v. Wright*, (1799) 8 T.R. 293; *R. v. Creevey*, (1813) 1 M. & S. 273.

reporting Parliamentary proceedings which was formerly involved in doubt.¹

48. Newspaper reports privileged under the Law of Libel Amendment Act, 1888.²—In England this Act confers a qualified privilege on newspaper³ reports of the following: (i) Proceedings of a public meeting, *i.e.*, "a meeting *bona fide* and lawfully held for a lawful purpose, and for the furtherance or discussion of a matter of public concern, whether the admission thereto be general or restricted." A meeting of passive resisters for protesting against the levying of certain rates has been held to be a lawful one.⁴ The proceedings of the shareholders of a public company were held reportable.⁵ A chapel service was held not to be a public meeting.⁶ (ii) Proceedings of any meeting of a vestry, town council school-board, board of guardians, board or local authority constituted under any Act of Parliament, or of any committee appointed by any of the said bodies, or of any commissioners appointed by Act of Parliament, Royal Warrant or other lawful authority, select committees of the Houses of Parliament, justices of the peace assembled for administrative or deliberative purposes. A report of the proceedings of the General Medical Council was held privileged.⁷ (iii) Publication under official authority of any notice or report issued by the Government or any of its departments, officers of state, commissioner of police or chief constable for public information. Besides the requirements that the report should be fair and accurate and not published maliciously, there are three other conditions: (a) The matter published should be of public concern or its publication for the public benefit. Therefore a purely personal imputation made by a speaker at a public meeting cannot be reported.⁸ (b) The matter published should not be blasphemous or indecent. (c) The protection is not available if it is proved that the defendant had been requested to insert in the newspaper a reasonable letter or statement by way of contradiction or explanation of the report, and had refused or neglected to insert the same. This Act conferred on the newspaper press a right of reporting which courts were then unwilling to allow,⁹ and has thereby helped the great development of

1. The doubt was caused by the fact that Parliament had passed standing orders prohibiting reports of its proceedings and punished breaches of their orders; on this subject, see May's Constitutional History of England, Vol. I, pp. 326, 331-345; Odgers, Libel and Slander, p. 269.

2. 51 & 52 Vict. c. 64.

3. As to the meaning of the word 'newspaper,' see above, para 44.

4. *Spearing v. Wandsworth Borough News Co.*, Times, July 3rd, 1906; Gatlley, p. 359.

5. *Ponsford v. Financial Times, Ltd.*, (1900) 16 T.L.R. 248.

6. *Chaloner v. Lansdown & Sons*, (1894) 10 T.L.R. 290.

7. *Allbutt v. General Medical Council*, (1889) 23 Q. B. D. 400.

8. *Ponsford v. Financial Times*, (1900) 16 T. L. R. 248; *Kelly v. O'Malley*, (1889) 6 T. L. R. 52.

9. *Purcell v. Sowler*, (1876) 1 C. P. D. 785; 2 C. P. D. 213; *Murray v. Wright*, (1886) 3 T. L. R. 15 were among the cases that led to the agitation for legislation.

journalism in modern times. In India in the absence of a similar enactment, the above rules would presumably be followed.

49. Extracts or abstracts from Parliamentary reports.—Fair and accurate extracts or abstracts from reports of proceedings published by order of Parliament are privileged,¹ e.g., the report of a Royal Commission or blue-book presented to Parliament.²

50. Copies of extracts or abstracts from judicial or official records.—Fair and accurate copies of extracts or abstracts from records of courts of law or departments of Government open to public inspection are privileged. Trade journals and trade protection societies have thus been held privileged in publishing abstracts from the register of county court judgments and decrees,³ of bills of sale, or receiving orders in bankruptcy.

51. Privileged communications.—The doctrine of qualified privilege in the case of communications is that they are warranted by a privileged occasion, i.e., by a legitimate duty or interest. It has been expounded in numerous decisions among which the leading place is still held by Baron Parke's pronouncement in *Toogood v. Spyring*.⁴ In that case a complaint by a tenant to his landlord about the misconduct of a workman sent by the landlord to make repairs on the premises was held to be privileged. The learned judge said :

"In general, an action lies for the malicious publication of statements which are false in fact and injurious to the character of another, and the law considers such publication as malicious, unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned.....If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society; and the law has not restricted the right to make them within any narrow limits."

52. Points to be proved in the defence of privilege.—In order to make out a communication to be privileged the defendant should prove⁵ :
(a) that there was a privileged occasion, i.e., an occasion in which he had a

1. This is enacted by the Act of 1840 already referred to; above, para. 44.

2. *Mangena v. Edward Lloyd*, (1908) 98 L. T. 640. 99 L. T. 824; *Mangena v. Wright*, (1909) 2 K.B. 958. But a head-line has no privilege; see *Mangena v. Edward Lloyd*.

3. *Searles v. Scarlett*, (1892) 2 Q.B. 56; *Jones v. Financial Times*, (1909) 25 T. L. R. 677; *Fleming v. Newton*, (1848) 1 H. L. C. 363; *Annaly v. Trade Auxiliary Co*, (1890) 26 L. R. Ir. 394.

4. (1834) 1 C. M. & R. at p. 193.

5. The form of the plea is that "the statement complained was made *bona fide* and without malice on a privileged occasion in discharge of the said duty or to protect the said interest of A." The plea must specify, if the plaintiff has not already done so, the facts which create the right or duty.

duty or interest in making the communication to a person or persons who had a corresponding duty or interest to receive it; (b) that the communication was relevant or pertinent to the occasion. It is then for the plaintiff to prove malice of the defendant in making the statement. It is not enough for the defendant to prove that he honestly believed in the duty or interest in himself or the other person, or in the relevancy of what he said; it is necessary that the court should be satisfied that a reasonable person would have done so.¹ The duty or interest must be one which people of ordinary intelligence and moral principle will appreciate.² The circumstances that constitute a privileged occasion cannot be catalogued or rendered exact; new arrangements of business and new habits of life may create new occasions of privilege which would fall within the flexible language of the definition already given.³ The tendency of courts is to place not any narrow but a broad construction on the terms 'duty' and 'interest.'

53. **Duty.**—The duty may be legal, moral or social.

54. **Legal duty.**—It may arise under law or statute, as in the case of a report issued in accordance with official duty.⁴ In *Adam v. Ward*,⁵ the plaintiff who was formerly an officer in a cavalry regiment and subsequently elected to the House of Commons made a speech in it charging the General commanding the brigade with sending confidential reports to headquarters on subordinate officers containing wilful misstatements. After investigation of the matter by the Army Council, the defendant who was the secretary of the Council sent by its direction to the General and to the press a letter vindicating him from the charges made by the plaintiff and making certain allegations in relation to the plaintiff's conduct while he was in service. The House of Lords held, first, that there was a privileged occasion as the Army Council had a legal and moral duty to investigate the matter to vindicate the General and to give true information to the public on a matter on which the plaintiff had given publicity to his own charges, and secondly, that the statements regarding the plaintiff were

1. *Adam v. Ward*, (1917) A.C. 309.

2. *Per Lindley, L. J.*, in *Stuart v. Bell*, (1891) 2 Q.B. at p. 350.

3. *Per Lord Buckmaster, L. C.*, in *London Association for Protection of Trade v. Greenlands*, (1916) 2 A.C. at p. 22

4. *Adam v. Ward*, (1917) A.C. 309; *Henwood v. Harrison*, (1872) L.R. 7 C.P. 606; *Andrews v. Nott Bower*, (1895) 1 Q.B. 888; *Narasimma v. Balwant*, (1903) I.L.R. 27 Bom. 585; *Govindan Nair v. Achyuta Menon*, (1915) 1 L.R. 39 Mad. 433; 28 M.L.J. 310; *Govind Das v. Bishambar Das*, (1917) I.L.R. 39 All. 561 (P.C.); 44 I.A. 192 (duty of 'chaudari' of caste panchayat to communicate its resolution); *Subedar v. Jagat Narain*, (1924) I.L.R. 46 All. 772 (report of Mukhia to police); *Prem Narain v. Jagadamba*, (1925) I.L.R. 47 All. 859; 23 A.L.J. 763 (report of municipal councillor about municipal servant); *Rawlins v. Anantlal*, 1921 Pat. 74 (entry of the plaintiff's name by the police in a surveillance register); *Khiroo Ranjan v. Mohammad*, (1938) 19 Pat. L.T. 186 (official report to superior).

5. (1917) A.C. 309.

relevant to the occasion as he was one of the officers whom the General was alleged to have treated badly. The duty may also arise under contract, as between principal and agent, but will not create any privilege if it is opposed to any provision of law or to public policy.¹

55. Moral or social duty.—Some well-known categories are :

- (i) Answers to enquiries about servants, traders, or customers ;
- (ii) Protection of another's interest ; and (iii) Public interest.

56. Answers to enquiries about servants, traders or customers.—The courts have recognised for a long time a moral or social duty to give information sought on such matters though it is not a legal or enforceable obligation.² The enquiry must appear to be a legitimate and not an idle or mischievous one. If it is answered, the informant may, of his own accord and unasked, correct any previous statement if he found it was mistaken ;³ and the person informed may tell his informant that the information was mistaken, *e.g.*, that a servant was wrongly recommended.⁴ A charity organisation society was held privileged in making an unfavourable report about the plaintiff, the daughter of a deceased officer in the army and then in distressed circumstances, applying for poor relief to a lady who made the enquiry.⁵

56(a). Privilege of trade-protection societies.—In *Macintosh v. Dun*,⁶ an appeal from the High Court of Australia, the defendants were a company trading for profit under the name of 'The Mercantile Agency' and supplied information of a defamatory kind about the plaintiff to an enquirer. The Privy Council held that the defendants were not privileged. In the course of an interesting judgment on the question of policy, Lord Macnaghten observed that for the purpose of this peculiar business, the defendants were likely to seek information from sources which may not be reliable and should take the consequences if it turned out to be false. In the United States and Canada, however, courts have allowed a privilege in similar cases.⁷ In *The London Association for Protection of Trade v. Greenlands*,⁸ the House of Lords had to consider

1. *Macintosh v. Dun*, (1908) A. C. 390, below, para. 56 (a) ; conversely, a duty or right may arise even though the publication amounts to a breach of a contractual duty. *Thurston v. Charles*, (1901) 21 T. L. R. 658 ; *Robshaw v. Smith*, (1878) 38 L. T. 423.

2. *Weatherston v. Hawkins*, (1786) 1 T. R. 110 ; *Rogers v. Clifton*, (1803) 3 Bos. & P. 587 ; *Kelly v. Partington*, (1833) 4 B. & Ad. 700 (domestic servant) ; *Smith v. Thomas*, (1835) 3 Bing. N. C. 372 (trader) ; *Bromage v. Prosser*, (1825) 4 B. & C. 247 (bank) ; *Robshaw v. Smith*, (1878) 38 L. T. 423 (trader).

3. *Gardener v. Slade*, (1849) 13 Q. B. 796.

4. *Dixon v. Parsons*, (1856) 1 F. & F. 24 ; *Fryer v. Kinnersley*, (1863) 15 C. B. N. S. 422.

5. *Waller v. Losh*, (1881) 7 Q. B. D. 619.

6. (1908) A. C. 390.

7. See (1908) A. C. at p. 401.

8. (1916) 2 A. C. 15 ; (1913) 3 K. B. 507 (C. A.). As to a similar case in Scotland, see *Barr v. Musselburgh Merchants' Association*, (1912) S. C. 174 (Ct. of Sess.).

a trade-protection society of a different type. The defendants were a mutual association of traders, more than 6,000 in number, for helping its members with information about the credit of third parties. The plaintiffs sued in respect of a libellous communication about them sent by the secretary to one of the members in answer to the member's application for information. The House of Lords held the communication to be privileged on the ground that a trader could employ a confidential agent for obtaining information for the purpose of his business and the secretary occupied only the position of such an agent though he was the common agent of others as well. Their Lordships distinguished *Macintosh v. Dun* as a case of a company trading for profit and occupying the position not of an agent but of a vendor or purveyor of such information, or a 'character shop' as it was called.¹ Therefore as the law now stands in England, a person can answer an enquiry about another's character or solvency, either as a matter of friendly obligation or as an agent employed for the purpose, but cannot run a business for the sale of such news. The fact that he is bound under a contract to do so will not give him a privilege. Besides there is the additional danger that if he sends a libellous report about another to an enquirer, and the enquirer divulges it to the party libelled in breach of a contract to keep it secret, he can in an action against the enquirer for breach of contract recover only nominal damages but not the damages he may have had to pay to the party libelled. It was so held in *Bradstreets British, Ltd. v. Mitchell*² on the ground that the loss incurred by him would in law be regarded as the consequence of his own tort and not the breach of the obligation of secrecy by the enquirer. The business of such trade protection societies is, therefore, open to great risks.

57. Statements made to protect another's interest.—A person may give information or warning to another in a confidential relation, like a friend or relation, *e.g.*, warning not to marry a particular suitor.³ He may inform even a stranger about the misconduct or bad character of the latter's servant,⁴ or about any impending danger or detriment to his person or property. Where the defendant hearing that A was about to take the plaintiff as his servant, wrote to A that the defendant had discharged the servant for misconduct, and on being asked for further particulars supplied them in a second letter, it was held that he was privileged.⁵ Similarly circumstances may justify one trader volunteering advice to or warning

1. See (1913) 3 K. B. at p. 558. 2. (1933) Ch. 190; below, Chap. XIV, para. 76.

3. *Todd v. Hawkins*, (1837) 8 C. & P. 88.

4. *Kine v. Sewell*, (1838) 3 M. & W. 297; *Clark v. Molyneux*, (1877) 3 Q. B. D. 237; *Stuart v. Bell*, (1891) 2 Q. B. 341.

5. *Pattison v. Jones*, (1828) 8 B. & C. 579; see also *Whiteley v. Adams*, (1963) 15 C.B.N.S. 392. The contrary view in *Storey v. Cullands*, (1837) 8 C. & P. 234, and *King v. Watts*, (1838) 8 C. & P. 614 is not likely to be followed now.

another about the character of a customer whom the latter intends to trust.¹ In *Soxhead v. Richards*² the defendant received a letter from his friend, the first mate of a vessel, charging the plaintiff, the captain, with continuous intoxication and consequent trouble and indiscipline during the voyage and asking him what should be done in the matter. He transmitted the letter to the owner of the ship and was held privileged. But where the defendant told the headmaster of a school that the plaintiff who was formerly the second master had been seen drunk in the street on a Sunday while he was in service, it was held that there was no privilege.³

58. Statements made in the public interest.—Under this head will fall information to the police about crimes,⁴ warning the public about danger, complaints to superior authorities about misconduct of public officials⁵ or persons seeking public office.⁶

59. Interest in making the statement.—The interest in making a statement may be : (a) the common interest of the parties or (b) the private interest of the defendant. It must be a legitimate one which the law will recognise. There can be no such interest in gossip or scandal, however interesting it may be to the speaker and the hearer.⁷

60. Common interest.—It may exist as between fellow-servants, master and servant, customers of the same trader, fellow-traders, fellow-officers, members of an association or company, persons in a confidential relationship, solicitor and client, principal and agent, members of the same family.⁸ The following are some instances of this head of privilege: a 'black list' circulated among members of an association of traders and containing names and addresses of persons unworthy of credit,⁹ the publication of a decision of a domestic tribunal like a club¹⁰ or caste¹¹ in a journal accepted as a mode of communication between the tribunal and the section of the

1. *Bennett v. Deacon*, (1846) 2 C.B. 628.

2. (1846) 2 C. B. 569.

3. *Goslett v. Garment*, (1897) 13 T.L.R. 391; see also *Botterill v. Whytehead*, (1879) 41 L. T. 588

4. *Johnson v. Evans*, (1800) 3 Esp. 32; *Maung Lu Gale v. Maung Po Thein*, (1912) 20 L.C. 290 (Bur.).

5. *Jenoure v. Delmege*, (1891) A.C. 73; *Jusab v. Morrison*, (1912) 15 Bom. L.R. 249.

6. *Kershaw v. Bailey*, (1848) 1 Ex. 743; *Veal v. Heard*, (1930) 46 T.L.R. 448 (letter written to a Justice's clerk in regard to the plaintiff who applied for a money-lender's licence).

7. *Rumsey v. Webb*, (1842) C. & M. 104; 11 L. J. C. P. 129.

8. *Toogood v. Spyring*, (1834) 1 C.M. & R. 181; *Hunt v. G. N. Ry. Co.*, (1891) 2 Q.B. 189; *Nevill v. Fine Art Insurance Co.*, (1891) A.C. 68; *Watt v. Longsdon*, (1930) 1 K.B. 130; *Ajit Singh v. Radhakishan*, 1931 Lah. 246 (a pleader showing pleadings in a case to other pleaders in the Bar room).

9. *Barr v. Musselburgh Merchants' Association*, (1912) S.C. 174 (Ct. of Sess.); see also *Ware and De Freville, Ltd. v. Motor Trade Association*, (1921) 3 K.B. 40 (stop-list).

10. *Chapman v. Ellesmere*, (1932) 2 K.B. 431.

11. *Govind Das v. Bishambar Das*, (1917) I.L.R. 39 All. 561 (P.C.) : 44 I.A. 192.

public interested in the matter, statements made before a caste panchayat making an inquiry,¹ a speech by one elector to fellow-electors about the character of a candidate² or by a member of Parliament to his constituents,³ a letter by one creditor to another about the conduct of their debtor,⁴ a letter by a creditor of an officer in the Army to the Commanding Officer to secure payment,⁵ discussion among members of a public body on matters properly under their consideration,⁶ a solicitor of a minor informing his next friend about his misconduct,⁷ a letter written by the defendants to the plaintiffs in a civil suit objecting to the name of a person suggested as arbitrator,⁸ a report on a company's affairs circulated to the shareholders,⁹ a letter by the owner of copyright in a publication to firms selling the infringing publication warning them that proceedings for infringement had been instituted.¹⁰ When a banker by mistake dishonoured a customer's cheque with the words "Not sufficient", he could not merely by making a mistake create a duty to make a defamatory statement or a common interest with the payee who presented the cheque.¹¹

61. Private interest of the defendant.—The following are instances: a statement made in the assertion of defence of property¹² or reputation of himself or his principal, employer, client or other person in whom he has a legitimate interest like a relation or a friend, a notice by a creditor to an auctioneer not to part with the debtor's goods as the debtor was in insolvent circumstances,¹³ notices between litigants or their solicitors,¹⁴ a letter to the Secretary for War requesting his intervention to make the plaintiff, an officer in the Army, pay a debt due to the defendant,¹⁵ an accusation of a crime, say theft of one's property, made by him to the suspected offender¹⁶ or to a third person¹⁷ to obtain information or detect the criminal or recover

1. *Daulat Singh v. Prem Singh*, 1938 All. 447.
2. *Bruce v. Leitch*, (1892) 19 R. 482 (Ct. of Sess.).
3. *Davison v. Duncan*, (1857) 7 E. & B. 229.
4. *Spill v. Maule*, (1869) L. R. 4 Ex. 232.
5. *Winstanley v. Bampton*, (1943) 1 K. B. 319.
6. *Pittard v. Oliver*, (1891) 1 Q.B. 474.
7. *Wright v. Woodgate*, (1836) 2 C.M. & R. 573.
8. *Roff v. British and French Chemical Manufacturing Co.*, (1918) 2 K.B. 677.
9. *Lawless v. Anglo-Egyptian Cotton Co.*, (1896) L.R. 4 Q B. 262; *Quarts Hill Gold Mining Co. v. Beall*, (1882) 20 Ch. D. 501; *Harris v. Thompson*, (1853) 13 C.B. 333.
10. *Frank Smythson Ltd v. Cramp & Sons*, (1943) 1 A.E.R. 322 C.A.
11. *Davidson v. Barclays Bank*, (1940) 1 A.E.R. 316.
12. *Mati Lal v. Indra Nath Banerjee*, (1909) I.L.R. 36 Cal. 907; 13 C.W.N. 1165.
13. *Blackham v. Pugh*, (1846) 2 C.B. 611.
14. *Campbell v. Cochrane*, (1906) 8 F. 205, *Bank of British North America v. Strong*, (1876) 1 A.C. 307.
15. *Fairman v. Ives*, (1822) 5 B. & Ald. 642.
16. *Fowler v. Homer*, (1812) 3 Camp. 294; *Padmore v. Lawrence*, (1840) 11 A. & E. 380; *Howe v. Jones*, (1884) 1 T.L.R. 19, 461.
17. *Forre v. Warren*, (1864) 15 C.B.N.S. 806; *Collins v. Cooper*, (1902) 19 T.L.R. 118.

the property, or to the police¹ for a like purpose, a statement by an employer of his reasons for discharging a servant made in the presence of a third person called by him to bear witness to the fact of discharge and the payment² of past wages,³ a reply to attacks made on one's conduct or character.³ A person may have a right to make a statement to explain his words⁴ or acts.⁵ For instance, where the footman and cook of the defendant went to him separately and asked him why they were dismissed and he replied to each, 'you were both robbing me,' two actions brought by them were dismissed.⁶ If they sent a friend to ask him whether he said so, he would be within his rights in repeating the charge to the enquirer.⁷ But there is no such protection for a person who originates a slanderous statement without any privileged occasion for doing so and on being asked about it repeats it.⁸ For instance, if a person circulates a false report about another and the latter in the company of his friends as witnesses asks him to withdraw or prove it, he cannot repeat the slander and plead privilege⁹; otherwise every defamer would get a licence to repeat his calumnies.

62. Reciprocal duty or interest.—In order to constitute a privileged occasion a duty or interest should exist not only in the defendant but also in the person or persons to whom he published the statement. In some cases the whole public may have an interest in being informed, *e.g.*, a controversy on a matter of public interest carried on in the press,¹⁰ warning given to the public about an impending danger or fraud, notices of sale or bankruptcy, reports issued by Government, public bodies or companies.¹¹ Where a limited number of people have an interest there is no privilege in a communication to others. A complaint about a crime or about the misconduct of a public official will be privileged if made to the person or authority who has an

1. *Johnson v. Evans*, (1800) 3 Esp 32; *Kishan Lal v. Moosi Raza*, (1923) 72 I.C. 57 (Oudh). 2. *Taylor v. Hawkins*, (1851) 16 Q.B. 308, 322; *Fowler v. Homer*, above.

3. *Laughton v. Bishop of Sodor and Man*, (1872) L.R. 4 P.C. 495; *O'Donoghue v. Hussey*, (1871) Ir. R. 8 C.L. 124; *Englishman, Ltd. v. Antonio*, (1930) 35 C.W.N. 271; 1931 Cal. 303. 4. *Palmer v. Hummerston*, (1883) Cab. and Ell. 36.

5. *Whiteley v. Adams*, (1863) 15 C.B.N.S. 392; *Cowles v. Potts*, (1865) 34 L.J.Q.B. 247.

6. *Manby v. Witt and Eastmead v. Witt*, (1856) 18 C.B. 544; see also *Reid v. Blisland School Board*, (1901) 17 T.L.R. 626.

7. *Warr v. Jolly*, (1834) 6 C. & P. 497; *Hopwood v. Thorn*, (1849) 8 C.B. 293; *Cowles v. Potts*, (1865) 34 L.J.Q.B. 247.

8. *Smith v. Mathews*, (1831) 1 Moo. & Rob 151; *Griffiths v. Lewis*, (1845) 14 L.J.Q.B. 197. 9. *Smith v. Mathews*, above.

10. *Adam v. Ward*, (1917) A.C. 309; *The Englishman, Ltd. v. Antonio*, above; cf. *Chapman v. Ellesmere*, (1932) 2 K.B. 431.

11. *Allbutt v. General Medical Council*, (1889) 23 Q.B.D. 400; *Mangena v. Wright*, (1909) 2 K.B. 958, 977.

immediate interest or duty in the matter,¹ but not if made to others² or to the public at large.³ A letter written to a member of Parliament by one of his constituents complaining about a police officer and asking him to take up the matter to the Home Secretary was held privileged as the member had a legitimate interest in the subject-matter.⁴ On the other hand the publication of the report of a committee of a Borough Council appointed to investigate charges against some of its employees by including the report in the agenda for a meeting to consider it and circulating the agenda to public libraries in the borough and affixing it on the door of the town-hall was held not privileged as the Council had no interest or duty in common with the rate-payers in the publication of the report before it had been considered by the Council itself. The Council would of course have been privileged if after consideration of the report it published its decision to the rate-payers.⁵ A publication to a person other than the person or persons who have a duty or interest is actionable, whether it was intentional or negligent, *e.g.*, sending a letter by mistake in a wrong envelope addressed to another,⁶ sending a privileged communication to the party interested by means of a post card,⁷ or a telegram,⁸ or a letter which was opened by another person who to the knowledge of the sender was likely to open it.⁹ An exception to the rule that publication to strangers is actionable is where it is incidental or subsidiary to the privileged publication. The following are two such cases :—

(i) Libellous matter which is privileged may be printed,¹⁰ typed, dictated to or copied by a clerk¹¹ or sent by a telegram¹² if it is necessary or in the reasonable and usual course of business to do so.¹³ If it is not necessary or reasonable there is no privilege for such subsidiary publication.¹⁴

1. *Harrison v. Bush*, (1856) 5 E. & B. 344; *Proctor v. Webster*, (1885) 16 Q.B.D. 112; *Jenoure v. Delmege*, (1891) A.C. 73.

2. *Blagg v. Sturt*, (1847) 10 Q.B. 899; *Hebditch v. MacIlwaine*, (1894) 2 Q.B. 54; *Purcell v. Sowler*, (1877) 2 C.P.D. at p. 221; see also *Dickeson v. Hilliard*, (1874) L.R. 9 Ex. 79.

3. *Simpson v. Downs*, (1867) 15 L.T. 391; see also *Irwin v. Read*, (1921) I.L.R. 48 Cal. 304; *Subbaraidu v. Tirumala*, (1926) 52 M.L.J. 87; 1927 Mad. 329.

4. *R. v. Rule*, (1937) 2 K.B. 375.

5. *De Buse v. McCarthy*, (1942) 1 A.E.R. 19 C.A.

6. *Hebditch v. MacIlwaine*, (1894) 2 Q.B. 54; see above, para. 27.

7. *Sadgrove v. Hole*, (1901) 2 K.B. 1; *Robinson v. Jones*, (1879) 4 L.R. Ir. 391.

8. *Williamson v. Freer*, (1874) L.R. 9 C.P. 393.

9. *Pullman v. Hill*, (1891) 1 Q.B. at p. 529.

10. *Lawless v. Anglo-Egyptian Cotton & Oil Co.*, (1869) L.R. 4 Q.B. 262.

11. *Boxsius v. Goblet Freres*, (1894) 1 Q.B. 842; *Ajit Singh v. Radhakishan*, 1931 Lab. 246; *Keshab Lal v. Provat Chandra*, 1938 Cal. 667.

12. *Edmondson v. Birch & Co.*, (1907) 1 K.B. 371.

13. *Roff v. British and French Chemical Manufacturing Co.*, (1918) 2 K.B. 677; *Isaacs & Sons v. Cook*, (1925) 2 K.B. 391.

14. *Pullman v. Hill*, (1891) 1 Q.B. 524; *Osborn v. Boulter & Son*, (1930) 2 K.B. 226.

(ii) Where the defendant has a duty or interest to speak on a certain occasion, he may do so in spite of the presence of strangers for which he is not responsible.¹ If, for instance, information were given to a person about the misconduct of his servant, and his manager or clerk happened to be in the room, the privilege will not be lost.²

63. **Relevancy of the privileged communication.**—Every communication made on a 'privileged occasion' is not a 'privileged communication'; it must be relevant to the occasion, *i.e.*, to the discharge of the duty or protection of the interest. A statement which is utterly unconnected with the occasion has no privilege and in respect of it there is no need for the plaintiff to prove malice. On the other hand it may be evidence of malice in the relevant and privileged part of the statement.³ For instance where a person in answer to a notice by his creditor's attorney to pay a debt, went out of the way to attack the private character of the creditor or some other person,⁴ that part of the reply was held not a privileged communication though made on a privileged occasion. But we must distinguish between a statement which is irrelevant to the occasion from one which is relevant but unnecessary.⁵ It is usual to speak of both statements as 'exceeding the privilege' but they differ in principle. In respect of the former statement, though it is made honestly, there is no privileged occasion at all; while the latter being made on a privileged occasion is protected if made honestly. Thus countercharges, imputations of motive, aspersions on character, untrue or inaccurate statements, unwarranted and excessive violence of language may fall under the latter category and may be protected if *bona fide* made or believed by the defendant to be necessary.⁶ The fact that a judge or jury considers them unnecessary or unreasonable will not take away the protection. It would depend on the circumstances whether any injurious reference to the plaintiff was relevant or pertinent to the occasion.⁷

64. **Malice.**—On the defendant proving the above points his communication is protected unless the plaintiff proves malice. Malice is used in a wider sense than the popular one of ill-will. 'The jurist

1. *Pittard v. Oliver*, (1891) 1 Q.B. 474; *Kershaw v. Bailey*, (1848) 1 Ex. 743. It is otherwise if the defendant brought about the presence of others; *Parsons v. Surgey*, (1864) 4 F. & F. 247; or could have spoken in their absence: *White v. Stone*, (1939) 2 K.B. 827 C.A.

2. *Per* Pollock, B., in *Jones v. Thomas*, (1885) 53 L.T. 678.

3. *Adam v. Ward*, (1917) A.C. at p. 318, *per* Lord Finlay, L.C.

4. *Huntley v. Ward*, (1859) 6 C. B. N. S. 514; see also *Warren v. Warren*, (1834) 1 C.M. & R. 250; *Senior v. Medland*, (1858) 4 Jur. N.S. 1039.

5. *Nevill v. Fine Art and General Insurance Co.*, (1895) 2 Q.B. at p. 170; *Adam v. Ward*, (1917) A.C. at p. 339.

6. *Cowles v. Potts*, (1865) 34 L.J.Q.B. 247, 250; *Jacob v. Lawrence*, (1879) 4 L.R. Ir. 579.

7. *E.g.*, see *Adam v. Ward*, (1917) A.C. at p. 339; *Davies v. Sneed*, (1870) L.R. 5 Q.B. 608; *O'Donoghue v. Hussey*, (1871) Ir. R. 8 C.L. 124.

has enlarged the layman's notion of malice.¹ It means an indirect or improper motive, *i.e.*, a motive other than a sense of duty or interest.² The motive may be one of gain, as where a person suspecting another of theft of his goods went to the latter's relations and charged him with theft hoping thereby to induce them to pay him some money to say no more on the matter, and not with the legitimate object of having the charge investigated or cleared up.³ In *Groom v. Crocker*⁴ the solicitors of an insurance company who defended at the instance of the company an action for negligence against the assured in a motor accident made an admission of his negligence in a letter to the opposite side in pursuance of pooling arrangements between insurance companies to avoid the heavy cost of fighting cases. It was held that this was an indirect motive which destroyed the privilege of the solicitors in respect of the statement which was defamatory of the assured person.⁴ Malice may be proved by (a) extrinsic or (b) intrinsic evidence.

65. Extrinsic evidence of malice.—Instances of it are previous quarrels, ill-feeling, repetition of the libels,⁵ unnecessary publicity. The untruth of the statement is by itself no evidence of malice; but the defendant's knowledge of it is conclusive proof of it.⁶ The only exception to this is where he had a duty to pass on information that came to him,⁷ *e.g.*, a report by a public official to his superior. But if the occasion was such that a person should not have published something which to his knowledge was untrue, or without taking care to ascertain the truth, his conduct will be evidence of an improper motive. Similarly unreasonable belief in false statements or rumours or hearsay, or failure to make the necessary enquiries will be some evidence of bad motive.⁸ These facts, however, are not *per se* proof of malice and may co-exist with honesty.⁹ But reckless-

1. *Per* McCardie, J., in *Pratt v. British Medical Association*, (1919) 1 K.B. at p. 275.

2. *Clark v. Molyneux*, (1877) 3 Q.B.D. 237; *Stuart v. Bell*, (1891) 2 Q.B. at p. 351. It is usually called 'express malice'; *Govind Das v. Bishamber*, (1917) 1 L.R. 39 All. 571: 44 I.A. 192 (P.C.)

3. *Hooper v. Truscott*, (1836) 2 Bing N.C. 437.

4. (1939) 1 K.B. 194, 226, C.A. *per* Scott, L.J. if indeed they had a privilege at all. The solicitors were held liable for breach of contractual duty.

5. *Barrett v. Long*, (1851) 3 H.L.C. 395.

6. *Clark v. Molyneux*, (1877) 3 Q.B.D. at p. 250; *Shapiro v. La Motta*, (1923) 40 T.L.R. 39, 41, 201, 203.

7. *Stuart v. Bell*, (1891) 2 Q.B. at p. 351; *Botterill v. Whytehead*, (1879) 41 L.T. at p. 590; *British Ry., Traffic and Electric Co. v. The C. R. C. Co.*, (1922) 2 K.B. at pp. 271, 272.

8. The plaintiff can deliver interrogatories to the defendant to disclose the sources of his information or the steps he took to verify its truth; *Elliott v. Garrett*, (1902) 1 K.B. 870; *White v. Credit Reform Association*, (1905) 1 K.B. 653. As to interrogatories in the case of a plea of fair comment, see below, para. 69.

9. *Capital and Counties Bank v. Henty*, (1880) 5 C.P.D. at p. 538, *per* Cotton, L.J., 'mere carelessness is not of itself malice'; see also *Hesketh v. Brindle*, (1888) 4 T.L.R. 199.

ness as to whether the statements are true or false, due to anger or unreasoning prejudice may amount to malice.¹ Malice may be evidenced also by the conduct of the defendant during the trial or in the witness-box.² Though the mere raising of a plea of justification which is abandoned may not by itself prove malice,³ persisting in it or repeating it without attempting to prove it may be different.⁴

66. Intrinsic evidence of malice.—Instances of it are inclusion of irrelevant matter, unnecessary condemnation, improper imputations, violence in the language employed. But these circumstances are not conclusive.⁵ Merely unnecessary or unreasonable use of language may not by itself prove malice, as it may be equally consistent with honesty.⁶ Persons differ in their expressions and it is not enough if they are angry; they must be malicious.⁷ But it has been said that if "the language is utterly beyond and disproportionate to the facts, or improper motives are unnecessarily imputed," there is evidence to go to the jury.⁸ It will be a question in each case whether it falls within this description. The tendency of courts, however, is not to be too critical of the language, as any such attitude will unduly restrict free speech.

"If every word which is uttered to the discredit of another is to be made the ground of an action, cautious persons will take care that all their words are words of praise only, and will cease to obey the dictates of truth."⁹

There is, however, the safeguard that malicious persons will generally betray themselves into some kind of irrelevance or other indication of dishonesty besides excess in language. Malice on the part of one joint wrongdoer deprives the others of the privilege. In *Smith v. Streetfield*¹⁰ a printer who was employed to print a privileged communication was held to have lost the privilege because of the malice of its author. Similarly a corporation will be liable for the malice of its agents or servants, and

1. *Royal Aquarium v. Parkinson*, (1892) 1 Q.B. 431.

2. *Simpson v. Robinson*, (1848) 12 Q.B. at p. 514; *Taylor v. Williams*, (1831) 2 B. & Ad. 857; *Thomas v. Bradbury*, (1906) 2 K.B. 627.

3. *Wilson v. Robinson*, (1845) 7 Q.B. 68; *Caulfield v. Whitworth*, (1868) 18 L.T.N.S. 527. 4. *Warwick v. Foulkes*, (1844) 12 M. & W. 507; *Simpson v. Robinson*, above.

5. *Adam v. Ward*, (1917) A.C. at p. 339, per Lord Atkinson.

6. *Newell v. Fine Art and General Insurance Co.*, (1897) A.C. 68, 75; *Spill v. Maule*, (1869) L.R. 4 Ex. 232; *Laughton v. Bishop of Sodor and Man*, (1872) L.R. 4 P.C. 495; *Edmondson v. Birch*, (1907) 1 K.B. at p. 381.

7. *Tindal, C.J.*, in *Shipley v. Todhunter*, (1836) 7 C. & P. at p. 690.

8. *Spill v. Maule*, above; *Mati Lal v. Indra Nath*, (1939) I.L.R. 36 Cal. 907; 916; 13 C.W.N. 1165.

9. *Per Erle, C.J.*, in *Whiteley v. Adams*, (1863) 15 C.B.N.S. 392 at p. 418; see *Prem Narain v. Jagadambal*, (1925) I.L.R. 47 All. 859; 23 A.L.J. 763.

10. (1913) 3 K.B. 764; cf., *Prem Narain v. Jagadambal*, above. See *Crosier v. Wishart Books, Ltd.*, (1936) 1 K.B. 471, where the question which is obviously one of great importance for publishers was reserved.

the proprietor of a newspaper for the malice of the editor or correspondent.¹ But if a person was only a mechanical agent for publication, *e.g.*, a typist, messenger, or printer, his malice will not take away the privilege of his innocent principal. Thus it was held in *Adam v. Ward*² that an allegation of malice on the part of the secretary of the Army Council who was only the mechanical agent for the publication of the Council's letter was irrelevant.

67. Fair comment.—It is the right of all citizens, not merely newspapers and publicists,³ to make a fair comment on matters of public interest. The right had been recognised in cases of criticism of works of literature and art more than a century ago.⁴ It is since the middle of the last century that it has undergone a great expansion in the sphere of other matters of public interest.⁵ The form of the plea formerly was "that the words complained of are a fair comment made *bona fide* and without malice on a matter of public interest."⁶ But the following form is now in vogue,⁷ "that in so far as the statement complained of consists of statements of fact, they are true in substance and in fact, and in so far as it consists of comment, it is a fair comment made in good faith and without malice upon the said facts which are a matter of public interest." This has often been called a "rolled-up" or composite plea but has now been held by the House of Lords in *Sutherland v. Stopes*⁸ to be only a plea of fair comment and not to comprise one of justification, which if necessary must be separately pleaded. In order to substantiate the defence of fair comment, the defendant must establish that (a) the statement complained of is a comment, (b) that it is relevant to a matter of public interest. If he does this, the onus is shifted to the plaintiff to show that the comment is malicious.

68. Comment.—A comment is an expression of opinion on facts, *i.e.*, a conclusion or an inference from them and should be distinguished from a statement of fact.⁹ If it is the latter, the only available defences are justification and privilege. The importance of the distinction lies in the different

1. *Citizens' Life Assurance Co. v. Brown* (1904) A.C. 423; *Thomas v. Bradbury*, (1906) 2 K.B. 627; *Pearson v. Lord Mayor of Dublin*, (1907) A.C. at p. 354; *Fitzsimons v. Duncan*, (1908) 2 Ir. R. 483.

2. (1917) A.C. 309; above, para. 54.

3. *Per* Lord Shaw in *Arnold v. King-Emperor*, (1914) 1 L.R. 41 Cal. 1023, 1063 (P.C.); 41 L.A. 149; *per* Pickford, L.J., in *Neville v. Dominion of Canada News Co.*, (1915) 3 K.B. at p. 566.

4. *Dabdin v. Swan*, (1793) 1 K.p. 28; *Tabart v. Tipper*, (1808) 1 Camp. 350.

5. *Wason v. Walter*, (1868) L.R. 4 Q.B. 73 at p. 93, *per* Cockburn, C.J.

6. See Odgers, p. 644. This was after the Common Law Procedure Act, 1852. Prior to it the defence was pleaded under the general issue of "not guilty".

7. Since *Penrhyn v. The Licensed Victuallers' Mirror*, (1890) 7 T.L.R. 1.

8. (1925) A.C. 47; above, para. 38; below, para. 72.

9. For a definition of 'fact,' see the Indian Evidence Act, S. 3.

effects produced on the minds of the ordinary reader or hearer. If it is a comment on facts within his knowledge, he may form his own conclusion from them and may not be influenced by any unreasonable criticism which indeed may only disparage the critic rather than the person criticised. But if new facts are alleged, of which he has no independent knowledge, he is likely to treat them as true¹. Whether a statement is one of fact or comment depends on the language, context and other circumstances.²

69. Conditions of the defence of fair comment.—The following conditions should be satisfied when a person pleads this defence :—

(a) *Comment on true statements of fact.*—The comment must be based on statements of fact, i.e., true statements. If it is based on statements which are false, then the foundation of the defence fails, and the fairness of the comment does not arise.³ A man has no right to invent facts and then comment on them. Thus to call a book immoral or obscene when there is no immorality or obscenity in it is not a comment,⁴ any more than saying falsely that a book is full of spelling mistakes or plagiarisms when there are none.⁵ But to call a book obscene may be a comment if there are facts to warrant it.⁶

(b) *Reference to facts commented on.*—The facts must be referred to expressly or by implication so that the reader or hearer may reasonably understand the defamatory statement to be an inference from them. Otherwise it would amount to an allegation of a fact⁷ and a plea of fair comment would be struck out as improper. For instance a bald statement without express or implied reference to known facts that A's conduct is disgraceful is not a comment but a statement of fact. The defendant must justify it and if he tries to do so, can be called upon to give particulars of such conduct, and prove them to be true. On the other hand if the admitted facts of A's conduct are characterised as disgraceful, it is a comment and there can be

1. See *per* Fletcher-Moulton, L.J., in *Hunt v. Star Newspaper*, (1908) 2 K.B. 309 at p. 319.

2. *E.g.*, *Cooper v. Lawson*, (1838) 8 A. & E. 746; *Dukhyi v. Labouchere*, (1908) 2 K.B. 325 n.; *Lyon v. Daily Telegraph, Ltd.*, (1943) 2 A.E.R. 316 C.A.; *Surajmal v. Horniman*, (1917) 20 Bom. L.R. 185, 233; 47 I.C. 449; *Raghunath v. Mubandi Lal*, 1936 All. 780; 1936 A.L.J. 1014.

3. (1908) 2 K.B. at p. 320; *Truth & Sportsman, Ltd. v. Thompson*, (1932) 37 L.W. 566; 1933 P.C. 36; *Irwin v. Reid*, (1926) I.L.R. 48 Cal. 304; 25 C.W.N. 150; *Union Benefit Society v. Thakorlal*, (1935) 37 Bom. L.R. 1033; 1936 Bom. 114; *Mitha Kustomji v. Nusserwanji*, 1941 Bom. 278; *Raghunath Singh v. Mubandi*, 1936 All. 780.

4. *Merivale v. Carson*, (1887) 20 Q.B.D. 275 at p. 280.

5. *Joynt v. Cycle Trade Publishing Co.*, (1904) 2 K.B. 292 at p. 297.

6. *Sutherland v. Stokes*, (1925) A.C. 47, 68-69.

7. *Cooper v. Lawson*, (1838) 8 A. & E. 746; *Popham v. Pickburn*, (1862) 7 H. & N. 891; *O'Brien v. Marquis of Salisbury*, (1889) 54 J.P. 215; *Barrow v. Lahiri*, (1908) I.L.R. 35 Cal. 495.

no demand for particulars.¹ Besides the liability to give particulars, there is the further substantial distinction between the two defences, *viz.*, that in the case of justification, the defendant must prove the truth of the facts stated and also the truth or correctness of the comment; while if the defence is one of fair comment, a comment based on facts correctly stated may be fair though incorrect or erroneous.²

(c) *Facts and comments must be separable.*—When the statement complained of mixes up statements of fact and comments, the latter must appear reasonably distinguishable and as inferences from the former; otherwise they may be liable to be understood as independent statements of fact.³

(d) *Proof of truth of facts commented on.*—When the comment appears as a comment or induction from facts which are stated, the defendant must prove the truth of those facts, and it is therefore usual and safe to add a separate plea of justification. He is bound to give particulars and to prove that the statements are substantially true or correct. He is however absolved from the burden of pleading and proving their truth in two cases: (i) when the plaintiff admits their truth or they are well-known facts; (ii) when the facts purport to be taken from a privileged report or communication and are stated correctly, *i.e.*, with substantial accuracy.⁴ This is a very valuable right especially for newspapers as they can make comments on facts appearing from reports of judicial or other proceedings without being called upon to prove the truth of those facts.⁵ But this right exists only if the facts purport to be taken from the report, and is lost if the defendant asserts them to be true on his own authority or adopts them as his

1. *Aga Khan v. Times Publishing Co.*, (1924) 1 K.B. 675, 683; the defendant can give particulars of the facts referred to in the libel without a plea of justification; *Burton v. Board*, (1929) 1 K.B. 301. The defendant, a publisher, cannot be asked for sources of information on which the writer, not a party to action, made the comment; *Crosier v. Wishart Books, Ltd.*, (1936) 1 K.B. 471.

2. *Sutherland v. Stokes*, (1925) A.C. 47 at pp. 63, 75.

3. It is in this class of cases that the new form of the plea is usually adopted. If the old plea was adopted, the defendant could be compelled to give particulars of the matter of public interest and he would then have to pick out the statements of fact in the libel which are the basis of the comment. Under the present form of pleading the defendant is saved this trouble; *Aga Khan v. Times Publishing Co.*, above; *Digby v. Financial News*, (1907) 1 K.B. 502; *Tudor-Hart v. British Union for the Abolition of Vivisection*, (1937) 54 T.L.R. 154. He cannot offer particulars of other facts not stated in the libel; *Sudash Chandra Bose v. Knight & Sons*, (1927) 1 L.R. 54 Cal. 73; 1927 Cal. 297; *Peter Walker v. Hodgson*, (1909) 1 K.B. 239 at pp. 242, 248. He can deliver interrogatories to the plaintiff for proving his statements of fact; *Peter Walker v. Hodgson*, (1909) 1 K.B. 239. This cannot be done in the older plea. *Hindlip v. Mudford*, (1890) 6 T.L.R. 367. The new plea however is embarrassing and inconvenient; see (1925) A.C. at p. 75; (1909) 1 K.B. at p. 247.

4. *Surajmal v. Horniman*, (1917) 20 Bom. L.R. 185; 47 I.C. 449.

5. *Mangena v. Wright*, (1909) 2 K.B. 958; see also *Surajmal v. Horniman*, (1917) 20 Bom. L.R. at p. 233; 47 I.C. 449, *per* Beaman, J.

own.¹ In *Lajpat Rai v. "The Englishman,"*² the "Englishman" newspaper published an article which began, "It is about time now that the true facts as to the deportation of Lajpat Rai were given out" and proceeded to state that he was guilty of tampering with the loyalty of native sepoys. In an action against the newspaper, the defendants contended that these facts were referred to in a debate in Parliament. The Calcutta High Court held that the article amounted to an assertion by the writer of facts which he was not prepared to prove, and the defence of fair comment failed.

70. Matter of public interest.—The following are some instances: proceedings of public bodies or courts,³ administration of Government departments, public charities, or public companies, proceedings of public meetings or local authorities.⁴ Many matters may be of public interest by their inviting or challenging public attention,⁵ e.g., any published work of literature, art or science, advertisement of a new company, scheme or charity, controversy carried on in the public press, character, qualifications, or even private life⁶ of persons seeking a public office or position, etc. It has been held that the treatment of workmen employed in a colliery, the conduct or management of a newspaper⁷ or a trading company,⁸ methods of business adopted by a money-lender,⁹ conduct of a clergyman in a church,¹⁰ horse-racing¹¹ are subjects of public interest; but the administration of a private charity,¹² the relations between a landlord and his tenant,¹³ the financial position of a newspaper¹⁴ are not.

71. Relevancy of the comment.—The comment should be relevant to the facts of public interest in the particular case, i.e., should arise out of or be based on those facts.¹⁵ Otherwise it has no protec-

1. *Davis v. Shephstone*, (1886) 11 A.C. at p. 190; *Lefroy v. Burnside*, (1879) 4 L.R. Ir. 556 at pp. 565, 566; *Hunt v. Star Newspaper*, (1908) 2 K.B. 309 at pp. 317, 320.

2. (1909) I.L.R. 36 Cal. 883; 13 C.W.N. 895; in appeal (1910) I.L.R. 37 Cal. 760; 14 C.W.N. 713; see also *Barrow v. Lahiri*, (1908) I.L.R. 35 Cal. 495; 12 C.W.N. 490; *Subash Chandra Bose v. Knight & Sons*, (1928) I.L.R. 55 Cal. 1121; 32 C.W.N. 490.

3. Comment on pending proceedings may amount to a contempt and will then be illegal; above, para. 46.

4. *Stonden v. South Essex Recorders, Ltd.*, (1934) 50 T.L.R. 365.

5. *Per Cockburn, C.J.*, in *Seymour v. Butterworth*, (1862) 3 F. & F. at p. 386.

6. *Lyle-Samuel v. Odhams Press, Ltd.*, (1920) 1 K.B. 135 at p. 146, *per* Scrutton, L.J.

7. *Stuart v. Lovell*, (1817) 2 Stark. 93; *Macleod v. Wakley*, (1828) 3 C. & P. 311.

8. *Ponsford v. Financial Times*, (1900) 16 F.L.R. 248.

9. *Grey v. Labouchere*, Times, Decr. 7th, 1911.

10. *Kelly v. Tinling*, (1865) L.R. 1 Q.B. 699; *Walker v. Brogden*, (1865) 19 C.B.N.S. 65.

11. *Aga Khan v. Times Publishing Co.*, (1924) 1 K.B. 675.

12. *Gathercole v. Miall*, (1846) 15 M. & W. 319; *Booth v. Briscoe*, (1877) 2 Q.B.D. 496.

13. *Hogan v. Sutton*, (1867) 16 W.R. 127.

14. *Latimer v. Western Morning News*, (1871) 25 L.T. 44.

15. *McQuire v. Western Morning News*, (1903) 2 K.B. 100, 109, *per* Collins, M.R.

tion even if it is honest¹; because a comment unconnected with the facts stated or not founded on them is as bad as a comment without any facts stated at all. On the other hand relevant and honest expression of opinion is protected though it may be erroneous or unreasonable in the eyes of the judge or the jury.² Much less is it necessary that it is the only or inevitable conclusion or inference from facts.³ Any other rule imposing a limit of reasonableness or moderation on expression of opinion would besides being unworkable and uncertain be injurious to public interests.⁴ The phrase, 'fair comment' is ambiguous and likely to convey the contrary impression. 'Fair' may refer to the critic or his mind, and would then mean honest.⁵ It may refer to his words and would then mean just or reasonable.⁶ The phrase is really inadequate to express the principles involved in the defence. In *McQuire v. Western Morning News*,⁷ Collins, M. R. observed that 'fair' includes the ideas of relevancy and honesty. In that case the plaintiff an author of a musical play, sued the defendants in respect of an article in their newspaper which described the play as well as the acting, singing and dancing of his travelling company as inferior, vulgar and incompetent. It was held that the comment was not unfair as it was neither irrelevant nor shown to be malicious. On the other hand, in *Merivale v. Carson*⁸ a play of which the plaintiff and his wife were joint authors was described in a theatrical newspaper as having an immoral tendency. It was held that the comment was unfair as there were no facts to warrant it. In a famous judgment Lord Esher proposed the test: "Is the article in the opinion of the jury beyond that which any fair man, however prejudiced he may be, or however exaggerated or obstinate his views, would say of the work in question?" This test applies to every comment including defamatory imputations on character, motive or private life. If such an imputation arises on true facts of public interest referred to in the comment, it need

1. *Campbell v. Spottiswoode*, (1863) 3 B. & S. 769.

2. *Merivale v. Carson*, (1887) 20 Q.B.D. 275, 283, 284, *per* Bowen, L. J.

3. *Surajmal v. Horniman*, (1918) 20 Bom. L.R. at p. 246, *per* Beaman, J.

4. This is also in accordance with S 499, Exceptions, 2, 3 and 5, I. P. C.; *cf.* Stephen's Dig. of Cr. Law, Art. 392, p. 289, which stated the rule more narrowly. See Stephen's Hist. of Cr. Law, Vol. II, p. 381. For dicta suggesting condition of reasonableness, moderation, etc., see *Wason v. Walter*, (1868) L. R. 4 Q. B. at p. 96 *per* Cockburn, C. J.; *Kelly v. Sherlock*, (1866) L. R. 1 Q. B. 686, 689, *per* Bramwell, B.; for other instances, see Spencer Bower, pp. 106, 360, 361.

5. *Per* Lord Esher, M. R., in *Merivale v. Carson*, (1887) 20 Q. B. D. at p. 280.

6. *Per* Bowen, L. J., in *Merivale v. Carson*, (1887) 20 Q. B. D. at p. 283.

7. (1903) 2 K. B. 100 at pp 109, 110, 112. His judgment was cited with approval by Lord Finlay in *Sutherland v. Stopes*, (1925) A. C. 47.

8. (1887) 20 Q. B. D. 275.

not be a reasonable, correct or inevitable inference from them,¹ and is protected unless it is shown to be malicious. If the imputation, however, does not arise on the facts stated, it is not protected though *bona fide* believed to be true or warranted. An imputation against the author's character in a comment on his work is ordinarily irrelevant and unwarranted. If however his work was open to the charge of obscenity, a suggestion that he was of impure mind may be relevant.²

72. Illustrations of the defence of fair comment.—The defence was not upheld in the following cases:—

*Campbell v. Spottiswoode*³: The plaintiff who was a Protestant dissenting minister and the editor of a newspaper published in it letters on the subject of evangelising the Chinese, and the names of various persons who had promised to buy the paper in order to promote that propaganda. The defendant, the printer of the *Saturday Review*, published in it an article which in a satirical vein imputed to the plaintiff an attempt to make money out of a pretended charitable object and to deceive the public by false lists of subscribers. It was held that he was liable as there were no facts to warrant the imputations.

Joynt v. Cycle Trade Publishing Co.,⁴: The defendants, the proprietors and editors of a trade journal, published an article suggesting that the plaintiff, a solicitor, had enriched himself at the expense of the shareholders in certain companies and was unfit to be trusted. It was held that the article was libellous as there were no facts to warrant the imputation.

*Subbaramier v. Hitchcock*⁵: The defendants were a committee of public men who issued, and the editor of the '*Hindu*' newspaper who published, a report entitled 'Police Crimes in Ottapalam' on the events which occurred during a students' conference at that place in Malabar. The report charged the plaintiff, a superintendent of police, with having deliberately conspired with subordinate police officers to assault innocent people, when as a matter of fact he was not proved to have been aware of them. The Madras High Court held that it was unfair as there were no facts to warrant it and that it was no defence that the defendants believed it to be true.

1. *Joynt v. Cycle Trade Publishing Co.*, (1904) 2 K. B. 292. Kennedy, J.'s direction to the jury in this case has been often approved; see *per* Fletcher-Moulton, L. J. in *Hunt v. Star Newspaper Co.*, (1908) 2 K. B. at p. 320; see also *per* Buckley, L. J. at pp. 323, 324, and *Peter Walker v. Hodgson*, (1909) 1 K. B. at p. 253. On the other hand in *Dakhyl v. Labouchere*, (1908) 2 K. B. at p. 329, Lord Atkinson suggested that a personal attack must be a reasonable inference from the facts truly stated; see also *per* Scrutton, L. J. in *Homing Pigeon Co. v. Racing Pigeon Publishing Co. Ltd.*, (1915) 29 T. L. R. 389. In so far as the dicta in these cases suggest that an imputation of motive should be the necessary or inevitable conclusion from the facts, they are opposed to the rule enunciated by Collins, M. R., in *McQuire's case*, (1903) 2 K. B. 100. See also the distinction made between 'correct' and 'fair' by Lord Finlay in *Sutherland v. Stokes*, (1925) A. C. at pp. 62, 63. In India the statement of principle by Kennedy and Buckley, JJ., has been adopted; *Ramakrishna Pillay v. Karunakara Menon*, (1913) 25 M. L. J. 476; 21 I. C. 625; *Madras Times v. Rogers*, (1915) 30 M. L. J. 294; 32 I. C. 408; *Surajmal v. Horniman*, (1917) 20 Bom. L. R. at p. 246; 47 I. C. 449. See also Gatlley, p. 397.

2. I.P.C., S. 499, sixth Exception, Illustration (d).

3. (1863) 3 B & S. 769.

4. (1904) 2 K.B. 292.

5. (1924) 22 L.W. 26.

The defence was upheld in the following cases :

*Sutherland v. Stopes*¹ : It was held by the House of Lords that a charge of obscenity against the plaintiff's books on birth control was not unfair if regarded as a comment.

*Wason v. Walter*² : The defendant, the proprietor of the *Times* newspaper, published a report of a debate in the House of Lords on a petition presented by Earl Russell at the plaintiff's instance to investigate certain charges against a high judicial officer and strongly animadverted on the impropriety of the plaintiff in making charges which Earl Russell himself characterised as calumnious and false. The defendants were held not liable.

*Henwood v. Harrison*³ : The plaintiff, a naval architect, who had made certain plans and proposals in the matter of ship-building used the Queen's printer for printing and selling a report of the Lords of the Admiralty which purported to say that the proposals were worthless. It was held that the comment in the report was fair as it was relevant and not malicious.

73. **Standard of criticism in newspapers.**—Newspapers are subject to the same rules as other critics and have no special right or privilege.⁴ In effect, however, they perhaps enjoy considerable latitude. In *John Leng v. Langlands*⁵ Lord Haldane remarked that "in dealing with a newspaper article written about a public functionary considerable latitude is allowed by the law." This of course does not mean that they have any special right to make unfair comments or make imputations on character and motive. It means only that the tests of relevancy and honesty as well as of defamatory language are interpreted liberally in the light of prevalent standards of public discussion and criticism. There is no doubt that these standards are not so strict as they were formerly. Suggestions of unworthy motive are now so often made against public men that they have come to be regarded as incidental to their position.⁶ "Politicians give and receive hard blows."⁷ Very often strong attacks are invited by the conduct or language of the persons criticised. "You cannot meet a whirlwind with a zephyr."⁸ Two instances are given below :—

*Madras Times Ltd. v. Rogers*⁹ : The plaintiff, the secretary of an association of Railway workmen was acting as their spokesman in a dispute with the M.S.M. Ry. Co.,

1. (1925) A.C. 47; above, para. 38. 2. (1868) L.R. 4 Q.B. 73.

3. (1872) L.R. 7 C.P. 606.

4. *Per* Lord Shaw in *Arnold v. King-Emperor*, (1914) 1 L.R. 41 Cal. 1023 at p. 1063 (P.C.) : 41 L.A. 149; *Subash Chandra Bose v. Knight & Sons*, (1928) 1 L.R. 55. Cal. 1121 : 32 C.W.N. 490.

5. (1916) 114 L.T. 665, 667. The observation was obiter as the only issue was whether the words were capable of the meaning alleged by the plaintiff and there was no question of the right of newspapers; see *per* Lord Kinnear, p. 668.

6. *Seymour v. Butterworth*, (1862) 3 F. & F. 372, 378, *per* Cockburn, L.J.; see Clerk and Lindsell, pp. 552-3; Odgers, Libel & Slander, p. 183; Sir James Stephen deplors the tendency and would see the law made more stringent, History of the Criminal Law, Vol. II, p. 385. The tendency is said to be more pronounced in the U.S.A.; see the 'Newspaper' by G. B. Diblee (Home University Library) pp. 32-35.

7. *Per* Huddleston, B., in *Bryce v. Rusden*, (1885) 2 T.L.R. 435, 440.

8. *Per* Darling, J., in *Crossland v. Farrow*, *Times*, Feb. 7, 1905, cited by Ball, Law of Libel affecting Newspapers, p. 57.

9. (1915) 3J M.L.J. 294 : 32 L.C. 408.

when a strike was threatened. The *Madras Times* published an article describing him as a mischievous agitator with overweening egotism, misleading the men and fomenting a strike for selfish objects. The Madras High Court held that the article did not exceed the limits of fair comment.

*Odger v. Mortimer*¹: The defendant's newspaper in the course of a particularly violent attack on the plaintiff who was organising a public agitation against a Bill introduced in Parliament, described him as "half booby, and half humbug, a demagogue of the lowest type, a political Cheap Jack who would be a political harper if he had brains enough," and suggested by the following words that he was trying to secure a Government appointment: "I have any quantity of bottled-up abuse, treason, and riot. I will exchange the whole lot for any permanent appointment with £250 per annum and upwards. George Odger." This passed muster with a London Jury who gave a verdict for the defendant. In refusing to disturb the verdict, Bovill, C.J., in the Court of Appeal said that in the circumstances this was not to be considered as an attack on the plaintiff's honour or honesty and that a newspaper was entitled to attack or ridicule in the strongest possible terms the plaintiff's conduct as a public man.

74. Malice.—(a) *Extrinsic evidence.*—In *Thomas v. Bradbury*,² extrinsic evidence of malice was held admissible and accordingly evidence of previous strained relations between the plaintiff, an author, and his critic was admitted. In the Court of Appeal, Collins, M. R., observed that the right to comment though shared by the public was also the right of the individual who exercised it and a comment coloured by malice could not be fair. It must be shown, however, that the malice of the critic had warped his judgment or criticism, as it is possible that even a hostile critic had exercised a dispassionate judgment on the matter and expressed himself with moderation.³ The fact that the defendant had no reasonable grounds for his opinion is some evidence, though not conclusive, of his dishonesty;⁴ so would be his failure to retract an opinion even after its error had been pointed out.⁵ Where a number of people by concert hissed an actor when he appeared on the stage, the conspiracy was good evidence of malice to prove that the hissing was not a fair comment on his performance.⁶ In the case of a newspaper article contributed by an anonymous correspondent giving a fictitious name and address the newspaper cannot be sued on the ground merely that though the article does not exceed the limits of fair comment, the anonymous writer might have been

1. (1873) 28 L.T. 472.

2. (1900) 2 K B. 627 at p. 638.

3. (1906) 2 K. B. at p. 642, *per* Collins, M. R.

4. The plaintiff can therefore interrogate the defendant to disclose the grounds for his opinion; *Plymouth Mutual Co-operative Society v. Traders' Publishing Association*, (1906) 1 K. B. 403; but not the sources or informants if a newspaper is sued; *Lyle-Samuel v. Odhams*, (1920) 1 K. B. 135. This immunity does not extend to a contributor of an article to a newspaper; *South Suburban Co-operative Society, Ltd. v. Orum*, (1937) K. B. 690.

5. In the U.S.A., there are laws in many States which treat a failure to retract an untrue statement or opinion as malice. 22 Har. L. R. 97, 111-3; 35 Har. L. R. 867.

6. *Gregory v. Brunswick (Duke of)*, (1844) 6 M. & G. 951.

malicious. Nor is the newspaper under a duty to make inquiries about the identity of the writer and even if there was negligence in not so inquiring it would not take away the defence of fair comment.¹

(b) *Intrinsic evidence*.—Here, as in the case of privileged communications,² courts will not be too critical of the language provided the conditions above referred to are satisfied, and there is no other evidence of malice. Every latitude is given to opinion and prejudice. Mere exaggeration or even gross exaggeration would not make a comment unfair.³ The language may, however, be so intemperate or disproportionate to the facts as to suggest malice,⁴ e.g., if there is no criticism at all but only invective. But invective and ridicule may be merited or provoked by the admitted conduct of the plaintiff,⁵ or tolerated by both parties as in political controversies.⁶ It is quite open to a judge or jury to hold that in spite of excessive language or violence or heat in expression, the defendant was honest. The irrelevancy or falsehood of other parts of the statement will also be evidence of malice in respect of the relevant comment.

75. Distinction between the defences of fair comment and justification.—The defence of fair comment differs in material respects from that of justification. In the first place, the former applies only to comments or opinions, and the latter to statements of fact. Secondly, when there is a plea of justification in respect of a statement containing facts and opinion, the opinion must be proved to be substantially correct or true.⁷ On the other hand, if the plea is one of fair comment, the opinion may be protected though it is erroneous, exaggerated or prejudiced.⁸

76. Distinction between the defences of fair comment and privilege.—The defence of fair comment differs from that of qualified privilege in the mode of trial in England. In the case of the former, the judge decides whether there is a matter of public interest,⁹ and the jury decides all other matters,¹⁰ viz., whether the comment is based on facts truly stated and relevant and whether it is malicious. The usual question

1. *Lyon v. Daily Telegraph Ltd.*, (1943) 1 K. B. 746 C. A. 2. Above, para. 66.

3. *Per* Lord Esher in *Merivale v. Carson*, (1887) 20 Q. B. D. at pp. 280, 281; see also the summing up of Bray, J., to the jury in *R. v. Russell* decided in 1905 and cited in *Fraser, Libel & Slander*, p. 164; *Gatley*, p. 391; *per* Darling, J., in *Digby v. Financial News* cited in *Fraser, Libel & Slander*, p. 163.

4. E.g., *Woodgate v. Ridout*, (1865) 4 F. & F. 202.

5. E.g., see *Hunter v. Sharpe*, (1866) 4 F. & F. 983.

6. See above, para. 73.

7. *Peter Walker v. Hodgson*, (1909) 1 K. B. 239, 250; *Sutherland v. Stokes*, (1925) A. C. 47, 62, 75.

8. *Merivale v. Carson*, (1887) 20 Q. B. D. 275; above, para. 71. See also above, para. 69 (a).

9. *South Hetton Coal Co. v. N. E. News Association*, (1894) 1 Q. B. at pp. 141, 143.

10. *Sutherland v. Stokes*, (1925) A. C. at p. 87.

put to the jury is whether the statement complained of exceeds the limits of fair comment or criticism.¹ The judge, however, is bound to withdraw the case from the jury if in his opinion there is not even *prima facie* evidence of unfairness.² In the case of privilege, the judge decides whether there is a privileged occasion and the communication is relevant to it, and the jury decides only whether it is malicious.³ The judge is bound to withdraw the case from the jury if in his opinion there is no *prima facie* evidence of malice.⁴

77. **Resemblance of the defences of fair comment and privilege.**—While the distinction between the two defences is in the mode of trial, they have in substance a strong similarity. They are traceable ultimately to the same principle of legal policy, *viz.*, public interest and advantage in allowing persons to speak freely on certain matters. The limit of the right is to speak honestly, though erroneously or falsely. Therefore malice destroys both defences. Within this limit, the right varies in its incidence and measure according to the kind of public advantage secured in different cases. Sometimes the right belongs only to persons in particular situations, *e.g.*, an employer giving his opinion about a servant. In other cases it belongs to all, *e.g.*, the right to report a judicial proceeding. The public advantage in allowing employers or tradesmen to give information about servants or customers extends to the communication of facts and opinions. But the right of criticism extends only to the expression of opinion. The true view of these defences, therefore, appears to be that they spring from a large and elastic principle of policy applicable to different situations. There are however dicta of eminent judges suggesting the contrary. In *Campbell v. Spottiswoode*,⁵ Blackburn and Crompton, JJ., observed that privilege is the peculiar right or immunity of some persons while fair comment is the right of all.⁶ In *Henwood v. Harrison*,⁷ on the other hand, Justice Willes regarded fair comment as a species of privilege. In *Merivale v. Carson*,⁸ Bowen, L.J., agreed with the former view and disagreed with

1. *Merivale v. Carson*. (1887) 20 Q. B. D. at p. 283. The issue of libel or no libel has been the province of the jury since Fox's Libel Act.

2. *Henwood v. Harrison*, (1872) L. R. 7 C. P. at p. 628; *McQuire v. Western Morning News*, (1903) 2 K. B. 100, 112.

3. *Adam v. Ward*, (1917) A. C. 309, 318, 321, 332, 340; *Minter v. Priest*, (1930) A. C. 558; if the facts are in dispute, he may leave them to the jury.

4. (1917) A.C. at p. 318; the usual phrase is 'when there is no more than a *scintilla* of evidence of malice.'

5. (1863) 3 B. & S. 769.

6. With respect, this view does not take note of privileged reports. It is explained partly by the ambiguity of the word 'privilege' which in other contexts means an exclusive right or franchise, and partly by the fact that the law of privilege and fair comment had not then fully developed and has undergone considerable expansion during the last 50 years.

7. (1872) L. R. 7 C. P. 606.

8. (1883) 20 Q. B. D. 275; Lord Esher also drew the same distinction.

that of Justice Willes. In *Thomas v. Bradbury*,¹ Collins, M. R., observed that while it may not be accurate to call fair comment a kind of privilege, the two defences are in substance similar. The difference between these eminent judges in the theoretical exposition of the law of fair comment remains to be settled by the House of Lords.² Another distinction between the two defences has been suggested, *viz.*, that fair comment like justification is a denial of the defamation while privilege admits the defamation and establishes an excuse.³ This is open to the criticism that the defence of fair comment, unlike that of justification, extends even to erroneous, unreasonable or exaggerated opinions and imputations.⁴ A practical objection against the view that fair comment is analogous to privilege has been advanced, *viz.*, that the result will be to protect even unreasonable and immoderate comment unless malice is proved and thereby to extend unduly the limits of criticism. But⁵ it must be remembered that the defence of fair comment requires other conditions besides honesty, *viz.*, the truth of facts stated, and relevancy.

78. Defence of apology.—An apology is not under the common law a defence to an action for defamation but is only a circumstance in mitigation of damages.⁶ But in England under the Libel Act of 1843,⁷ it is available, under certain conditions,⁸ as a defence in actions for libel against newspapers and other periodical publications. There is no similar legislation in India. The fact that the plaintiff accepted an apology and withdrew a criminal prosecution for defamation would not bar a civil suit.⁹

1. (1906) 2 K.B. 627.

2. *Sutherland v. Stokes*, (1925) A.C. at p. 82, *per* Lord Shaw. On this controversy, text-writers also are divided. Sir F. Pollock took the view of Bowen (Torts, p. 202; also L. Q. R. Vol. 23, p. 5), while Salmond (Torts, pp. 445-448) and Spencer Bower (p. 95), held *contra*; see also Clerk and Lindsell, Torts, pp. 625-6, Winfield, Law of Torts, p. 300; Radcliffe, 23 L.Q.R., p. 97.

3. *Per* Bowen, L.J., in 20 Q.B.D. at p. 283; *per* Vaughan Williams, L.J., in *Peter Walker v. Hodgson*, (1909) 1 K.B. at p. 250; Pollock, Torts, p. 202; *contra* Buckley, L. J. in (1909) 1 K.B. at p. 253. The proposition was formerly true in the sense that fair comment fell under the 'general issue.'

4. Above, para. 71.

5. *Per* Vaughan Williams, L. J., in (1909) 1 K. B. at p. 250; Pollock, Torts, p. 204, note (r).

6. *Smith v. Harrison*, (1856) 1 F. & F. 565.

7. 6 & 7 Vict., c. 96 amended by 8 & 9 Vict., c. 75.

8 They are: (a) the libel should have been published originally in the newspaper or other publication without malice and without gross negligence; (b) the defendant should at the earliest opportunity have inserted or offered to insert a sufficient apology in the newspaper or periodical publication; (c) a sufficient amount of money must be paid into court by way of amends at the time the plea is delivered; (d) no other defence denying liability is joined with the plea of apology. In practice parties prefer the procedure under R. S. C., O. 22, r. 1, of admitting liability and paying some amount of money into court; *cf.* C.P.C., O. 24.

9. *Govindacharyulu v. Srinivasa Rao*, 1941 Mad. 860.

79. Remedies.—The usual remedy is a civil action for damages. The plaintiff can ask for an injunction to prevent a threatened publication of defamatory statements.¹ The remedy of criminal prosecution is also available, and is frequently invoked in India.² The laws of some continental countries like Germany allow a mode of specific relief by compelling the defendant to retract the libel or make an apology.³

80. Damages.—Damages are awarded in one lump sum⁴ but fall under two different heads: (a) pecuniary reparation or solatium to the plaintiff for the annoyance, mental pain, inconvenience, etc., (b) compensation for the actual damage that he has sustained as a direct consequence of the publication. The phrases 'general' and 'special' damage and 'general' and 'special' damages are used in this connection⁵ but they are not precise legal terms.⁶ 'General' or 'presumptive' damage means damage which the law presumes as a necessary consequence of the defamation⁷ and is distinguished from 'special damage' which is not so presumed but has to be alleged and proved.⁸

81. General damages.—The assessment of a pecuniary reparation or solatium is really arbitrary and not amenable to any legal standard of measurement.⁹ It is in the discretion of juries in England and judges in

1. *Saxby v. Easterbrook*, (1878) 3 C.P.D. 339; *Monson v. Tussauds*, (1894) 1 Q.B. at p. 690. As to issue of a temporary injunction pending suit, see *Dunlop v. Dunlop Rubber Co., Ltd.*, (1921) Ir. R. 280; (1921) 1 A.C. 367; but not if the defendant's liability is not clear; see *Corelli v. Wall*, (1906) 22 T.L.R. 532 (defamatory tendency of statement doubtful); *Bennard v. Perryman*, (1891) 2 Ch. 269 (plea of truth); *Quarits Hill Gold Mining Co. v. Beall*, (1882) 20 Ch. D. 501; *Champion v. Birmingham Vinegar Brewery*, (1893) 10 T.L.R. 164 (plea of privilege); *Armstrong v. Armit*, (1886) 2 T.L.R. 887 (plea of fair comment). As to history of injunction in libel actions, see Roscoe Pound, 29 Har. L.R. 640.

2. In England it has been held appropriate only when the libel affects the public, as an attempt to disturb the public peace; see *per Coleridge, C.J.*, in *Lonsdale v. Yates*, (1887) 3 T.L.R. 193; *R. v. Ramsay & Foote*, (1888) 48 L.T. 733. See also *R. v. Wicks*, (1936) 154 L.T. 471. A limited company may be indicted for libel; *Triplex Glass Co. v. Lancagay Glass Co.*, (1939) 2 K.B. 395 C.A.

3. 35 Har. L.R. 867. See also Spencer Bower, pp. 157, 433. It was afforded by the old ecclesiastical courts in England and was advocated by Bentham.

4. As to consolidation of actions and apportionment of damages between defendants in them, see Law of Libel Amendment Act, 1888, s. 5, *Mitchell v. Hirst, etc. Ltd.*, (1936) 3 A.E.R. 872.

5. Odgers, p. 304, Spencer Bower, pp. 29, 154; see e.g., *Lionel Barber v. Deutsche Bank*, (1919) A.C. 304 at p. 318, *per Lord Haldane*; *Wilson v. United Counties Bank, Ltd.*, (1920) A.C. 102, 140.

6. *Per Bowen, L.J.*, in *Ratcliffe v. Evans*, (1892) 2 Q.B. at p. 528.

7. Odgers, p. 304. This is not however a rigid distinction as the plaintiff can and must prove facts which will increase the amount of general damages; Indian Evidence Act, s. 12. See Arnold, Damages and Compensation, p. 331; *Whitney v. Moignard*, (1890) 24 Q.B.D. 630.

8. For the meaning of the phrase in the English law of slander, see Appx. para. 2.

9. *Bray v. Ford*, (1896) A.C. at p. 50.

India. The amount will depend on the language, form and other circumstances of the publication, and also on the rank and social position of the parties. A false charge of a crime or immoral conduct is a more serious injury to a person of social position than to one belonging, say, to the criminal classes,¹ and is again more serious than an imputation of some merely unconventional conduct. "An imputation in the way of one's trade or business is generally a serious matter."² A defamatory statement made by a man of influence will presumably do more harm than one by an insignificant person.³ A libel in a newspaper especially one with a very large circulation is ordinarily a greater wrong than a libel published to a few persons.⁴ The amount of general damages may be increased by aggravating circumstances or reduced by mitigating circumstances. In the former case the damages may become punitive or exemplary and in the latter, nominal or even contemptuous.

82. Aggravating circumstances.—Instances of them are: malice, gross recklessness, violence of language or wantonly harmful kind of imputation calculated to outrage feelings and cause mental pain to the plaintiff,⁵ excessive publicity,⁶ repetition of the libel, publishing fresh libels before or after the suit,⁷ refusal or neglect to retract or apologise, conduct of the defendant during the trial of the action,⁸ an unsuccessful plea of justification,⁹ persisting in that plea with knowledge that it cannot be proved,¹⁰ even the conduct of the defendant's counsel, as where he makes

1. *Per* Lord Alverstone, C.J., in *Jones v. Hulton*, (1909) 2 K.B. at p. 457 (damages £ 1,750); see also *Robert v. Daniel*, (1888) 5 T.L.R. 542 (imputation of immorality to a clergyman, attempted to be justified, verdict for £ 2,000).

2. *Lionel Barber v. Deutsche Bank*, (1919) A.C. 304 (£ 3,000); cf. *Wilson v. United Counties Bank*, (1920) A.C. 102 (£ 7,500 for causing bankruptcy by negligence and the consequent loss of credit and reputation).

3. As to proof of influence by wealth of the defendant, see *Newell, Slander & Libel*, p. 1026.

4. *Per* Parke, B., in *Gathercole v. Miall*, (1846) 15 M. & W. at p. 324. The plaintiff can let in evidence of the number of subscribers; *Parnell v. Walter* (1890) 24 Q.B.D. 441. For Indian cases of newspaper libels, see *Subbaramier v. Hitchcock*, (1924) 22 L.W. 26: 1925 Mad. 950 (Rs. 6,000); *Madras Times v. Rogers*, (1915) 30 M.L.J. 294: 32 I.C. 408 (Rs. 3,000 awarded by trial judge upset on appeal); *Lafpat Rai v. "The Englishman"*, (1919) I.L.R. 37 Cal. 760: 14 C.W.N. 713 (Rs. 1,500); *Subash Chandra Bose v. Knight & Sons*, (1928) I.L.R. 55 Cal. 1121: 32 C.W.N. 490 (Rs. 1,000); *Khariduddin v. Tara Singh*, (1926) I.L.R. 7 Lah. 491 (Rs. 2,000). For other instances of awards in India, see *Irwin v. Reid*, (1921) I.L.R. 48 Cal. 304: 25 C.W.N. 150 (Rs. 2,000); *Nadir Shaw v. Piof Shaw*, (1913) 15 Bom. L.R. 130, 172: 19 I.C. 98 (Rs. 200).

5. *Lynch v. Knight*, (1861) 9 H.L.C. at p. 598; but mental pain or illness of the plaintiff's wife or daughter is not to be taken into account; *Guy v. Gregory*, (1840) 9 C. & P. 584: 36 Har. L.R. 226.

6. *Whitney v. Moignard*, (1890) 24 Q.B.D. 630.

7. *Pearson v. Lemaitre*, (1843) 5 M. & G. 700; but no damages for a fresh cause of action can be given.

8. *Fraed v. Graham*, (1889) 24 Q.B.D. 53; *Scott v. Sampson*, (1882) 8 Q.B.D. 491, 496.

9. *Darby v. Ouseley*, (1856) 25 L.J. Ex. 227, 230.

10. *Risk Allah Bey v. Whitehurst*, (1868) 18 L.T.N.S. 615.

damaging suggestions when cross-examining the plaintiff or in making his speech,¹ as such suggestions would be presumed to have been made on the defendant's instructions. The malice of one defendant will not enhance the damages against another,² though in the case of a privileged publication the malice of the principal will destroy the privilege of the agent and *vice versa*.³ The proper course for obtaining the higher amount is to sue the malicious defamer separately. The plaintiff cannot ask for separate sets of damages against different defendants but can obtain only one lump sum against all jointly.⁴

83. Punitive damages.—When damages are enhanced by aggravating circumstances, they are exemplary or punitive. Large sums have been awarded by juries in England⁵ and especially in the United States.⁶ The principle of punishing wrongdoers by such damages is now rooted in Anglo-American jurisprudence.⁷ It is also accepted in India though the large awards that are made in the wealthy countries of the west are not likely to be made here. It is interesting to observe how an action which at one time was in such judicial disfavour that it was strictly limited to actual pecuniary damage has, in changed social and economic conditions, been turned to new purposes. Recently the principle of punitive damages has received the exposition as well as the support of a great English Judge, Lord Atkin. In *Ley v. Hamilton*,⁸ a verdict of £ 5,000 for a libellous letter about a person of high position in public and commercial life published to his

1 *Simpson v. Robinson*, (1848) 12 Q.B. 511; *Risk Allah Bey v. Whitehurst* above; but see the observations of Lords Johnston and Anderson in *James v. Baird*, (1916) S.C. 510 at p. 526 (Ct. of Sess.) to the effect that express instructions of the defendant must be shown. In *Greenlands v. London Association for Protection of Trade*, (1913) 3 K.B. 507 at pp. 532, 563, the damages were said to have been aggravated among other reasons by the advocacy of the late F. E. Smith, Lord Birkenhead, counsel for defendants, and were set aside as excessive.

2 *Per Pollock, C.B.*, in *Clark v. Newsam*, (1847) 1 Ex. 131, 140; *Robertson v. Wyld*, (1838) 2 Moo. & Rob. 101; *Chapman v. Ellesmere*, (1932) 2 K.B. 431, 472.

3 *Smith v. Streetfeild*, (1913) 3 K.B. 764. See *Crozier v. Wishart Books*, (1936) 1 K.B. 471.

4 *Dawson v. McClelland*, (1899) 2 Ir. R. 486; *Damiens v. Modern Society*, (1911) 27 T.L.R. 164; *London Association for Protection of Trade v. Greenlands*, (1916) 2 A.C. at pp. 31-33, 40, 41.

5 *E.g.*, *Bryce v. Rusden*, (1885) 2 T. L. R. 435 (£ 5,000); *Adams v. Coleridge*, (1884) 1 T. L. R. 84 (£ 3,000 for a private letter); *Yousouppoff v. Metro-Goldwyn-Meyer*, (1934) 50 T.L.R. 581 (verdict for £ 25,000 for a Russian princess upheld by the C.A.).

6 See Newell, *Slander & Libel*, p. 1092; Vol. 17, *Ruling Case Law*, p. 445; Sedgwick, *Damages*, Vol. IV, s. 1335.

7 The practice began when the Court of Star Chamber inflicted heavy mulcts and fines for cases of *scandalum magnatum* and political libels, *e.g.*, *Lord Townsend v. Hughes*, (1676) 2 Mod. 150 (£ 400); *R. v. Burnardiston*, (1684) 9 St. Tr. 1334 (£ 10,000). For a criticism of the principle, see Newell, p. 1019; see also *per Wills, J.*, in *Parnell v. Walter*, (1890) 24 Q.B.D. at p. 453. It is not recognised by the German Civil Code which confines compensation to pecuniary damage; Schuster, *German Civil Code*, p. 341.

8 (1936) 153 L. T. 384 (H.L.).

business associates was set aside by the Court of Appeal¹ on the ground that the real damage suffered by the plaintiff was trifling and the sum awarded by way of punitive damages was far in excess of any fine that would be imposed by a criminal court for the same libel. In refuting this view and upholding the verdict in the House of Lords, Lord Atkin observed :

"They (damages for defamation) are not arrived at by determining the real damage and adding to that a sum by way of vindictive or punitive damages. It is precisely because the "real" damage cannot be ascertained and established that the damages are at large. It is impossible to track the scandal, to know what quarters the poison may reach ; it is impossible to weigh at all closely the compensation which will recompense a man or woman for the insult offered or the pain of a false accusation. The "punitive" element is not something which is or can be added to some known factor which is non-punitive. In particular it appears to present no analogy to punishment by fine for the criminal offence of publishing a defamatory libel."²

It must, however, be mentioned that there is a strong feeling not merely among newspaper proprietors and publishers who are often the victims of large verdicts but also among others that the prospect of obtaining such verdicts encourages actions for defamation.³ This feeling was voiced by Maugham, L. J., in the Court of Appeal, who made the remark that "it would indeed be an ill day for the public and the courts if a libel action came to be looked upon in the light of a gold-digging operation."⁴ While the only method open to a jury to express its disapproval of the defendant's conduct is by means of a numerically large sum, a judge can achieve that object by observations in his judgment. Therefore a judge's award need not be necessarily so high as a jury's.⁵

84. Mitigating circumstances.—The following are some instances : apology by the defendant before or after the action,⁶ facts showing absence of malice or of gross negligence like an inadvertent publication, innocent repetition of a libel mentioning the name of the informant,⁷ provocation by the plaintiff.⁸ The fact that the defamatory statement was justified in part

1. (1934) 151 L.T. 360, *per* Green & Maugham, L.JJ., Scrutton, L.J., dissenting.

2. 153 L. T. at p. 386. See also *Garbett v. Hazell & Co. Ltd.*, (1943) 2 A.E.R. 359 C. A.

3. See (1936) 81 L.J. 412. Among the proposals of empire journalists one was to make the law of libel similar to that of slander (above, para. 6); another was that a plaintiff should not, unless the judge gave a certificate, recover more damages than costs.

4. 151 L.T. at p. 374.

5. *Rook v. Fairrie*, (1941) 1 K.B. 507 C.A.; *Knuppfer v. London Express Newspaper Ltd.*, (1943) 1 K.B. 80 C.A. As to appellate court's power to alter damages, see *Rook v. Fairrie*.

6. *Smith v. Harrison*, (1856) 1 F. & F. 565. The apology should be sufficient and proper but need not be abject. If it is meagre or insulting it may aggravate damages; see *Kelly v. Shenlock*, (1866) L.R. 1 Q.B. 686, 695; *Chattel v. Daily Mail Co.*, (1901) 18 T.L.R. 165.

7. *Bennett v. Bennett*, (1834) 6 C. & P. 588; *Duncombe v. Daniel*, (1837) 8 C. & P. 222.

8. *Wakley v. Johnson*, (1826) Ry. & M. 422.

or nearly the whole may also mitigate damages.¹ But where there is no plea of justification, evidence of facts tending to show the truth of the libel is not admissible in chief or cross-examination.² Indeed any attempt of that kind will only aggravate damages.³ Evidence of the plaintiff's bad character is also allowed by way of mitigation on the ground that it is relevant to prove the extent of the damage to his reputation.⁴ He can lead evidence to prove his good character in rebuttal of any evidence adduced by the defendant either in chief or cross-examination. But he cannot do so in the first instance to enhance damages, because the law presumes his good character.⁵ It is hardly necessary to say that any attempt of the defendant to attack the plaintiff's character is extremely risky and will cost him dearly if unjustified. In England under the Law of Libel Amendment Act, 1888,⁶ the defendant in an action for a newspaper libel may give evidence in mitigation of damages that the plaintiff has recovered damages or commenced actions against others in respect of the same libel published by them. This is a great concession to newspapers, as the ordinary rule is that a person cannot rely on this fact to mitigate damages.⁷ The rule was liable to abuse as a person could sue in succession a number of newspapers who happened to publish the same libel.⁸ The conviction of the defendant in a criminal prosecution for the libel is not a ground for reducing damages.⁹

85. Distinction between nominal and contemptuous damages.—

While nominal damages are appropriate when the damage has been small or

1. *Waithman v. Weaver*, (1822) 11 Price 257 n.; *Chalmers v. Shackwell*, (1834) 6 C. & P. 475.

2. *Watt v. Watt*, (1905) A.C. 115 at p. 117, *per* Lord Halsbury, L.C.; "*The Englishman*" v. *Lafpat Rai*, (1910) I.L.R. 37 Cal. at p. 776 : 14 C.W.N. 713; cf. *Speck v. Phillips*, (1839) 5 M. & W. 279.

3. *Hay v. Star Newspaper*, Times, May 1st, 1912; *Risk Allah Bey v. Whitehurst*, (1863) 18 L.T.N.S. 615; *Nadirshaw v. Pirojshaw*, (1913) 15 Bom. L.R. 130, 168 : 19 L.C. 98.

4. *Scott v. Sampson*, (1882) 8 Q.B.D. 491; see also *Wood v. Cox*, (1888) 4 T.L.R. 652, 655; *Scaife v. Kempe & Co.*, (1892) 2 Q.B. 319; *Mangena v. Wright*, (1909) 2 K.B. 958; *Hobbs v. Tinsling*, (1929) 2 K.B. 1 (arising out of the conspiracy to blackmail an Indian Prince Mr. A.); cf. Indian Evidence Act, s. 55; "*The Englishman*" v. *Lafpat Rai*, (1910) I.L.R. 37 Cal. at p. 794 : 14 C.W.N. 713. Besides adducing evidence of the plaintiff's bad character, the defendant can cross-examine the plaintiff to test his veracity and shake his credit as a witness; Indian Evidence Act, s. 146. When there is no plea of justification, the defendant is required to give the plaintiff due notice and particulars of the matters on which the defendant proposes to give evidence of character for mitigation of damages; R.S.C., O. 36, r. 37. See also *Bracegirdle v. Bailey*, (1859) 1 F. & F. 536 (where the plaintiff was put into the box without any chief examination, he could not be cross-examined as to credit without a plea of justification).

5. *Bate v. Hill*, (1823) 1 C. & P. 100; *Cornwall v. Richardson*, (1825) Ry. & Moo. 305. He can do so if his character were otherwise relevant; *Fountain v. Boodle*, (1842) 3 Q. B. 5; see also *Brine v. Basalgette*, (1849) 3 Ex. 692. 6. S. 6.

7. *Harrison v. Pearce*, (1858) 1 F. & F. 567.

8. *Tucker v. Lawson*, (1886) 2 T.L.R. 593. In one case a person brought as many as 16 actions and recovered damages; see *Colledge v. Pike*, (1886) 3 T.L.R. 126.

9. *Venkayya v. Surya Prakashamma*, I.L.R. 1941 Mad. 255.

the plaintiff only desires to clear his reputation, contemptuous damages are awarded when he has not merely sustained no damage but his conduct is open to objection.¹

36. Special damage.—The plaintiff must in his pleading clearly aver the special damage before he can give evidence of it.² It should also be the direct consequence of the libel or slander published by the defendant. In England these two requirements apply to special damage in the case of slander not actionable *per se* and to that in the case of libel and slander actionable *per se*. But there are important points of difference between the two cases. (a) In the former, failure to satisfy the requirements of special damage will mean the failure of the action. In the latter, it would not, but the plaintiff would be awarded general damages and may under that head obtain reparation even for items of damage which may not be admissible as special damage. Thus in a case of slander not actionable *per se*, the plaintiff may rely on general loss of custom as special damage, if he pleads it;³ but in a case of libel, he need not plead it and may prove it under the head of general damages.⁴ Again the plaintiff may get general damages for mental pain,⁵ though it would be considered too remote as an item of special damage. It has been held that illness due to mental pain is also too remote a consequence of slander,⁶ but this view is not in accord with modern decisions on the subject of nervous shock and illness arising from it.⁷ The plaintiff cannot in the former case give evidence of damage arising after suit, but may do so in the latter to inflate the general damages by showing how injurious the words have been.⁸ Even in the former case, the plaintiff can give evidence of such damage under the head of general damages, if there is proof of some special damage to sustain the action. (b) In the case of slander not actionable *per se*, damage is the gist of the action and will be a fresh cause of action as and when it arises.⁹ But in other cases of defamation the plaintiff must claim compensation for prospective damage also and cannot wait till it arises. In India slander is actionable *per se* and the rules relating to special damage in the case of

1. See the explanation of a 'farthing damage' by Phillimore, J, in *Redman's Syndicate v Associated Newspapers*, (1910) 26 T.L.R. 394.

2. When the allegation is not clear, the defendant is entitled to particulars, or to have the allegation struck out; *Ratcliffe v Evans*, (1892) 2 Q.B. at pp. 529, 532-3; *The Mediana*, (1900) A.C. at p. 118, but not to particulars as to general damages; *London & Northern Bank, Ltd. v. George Newnes*, (1900) 16 T.L.R. 433.

3. *Ratcliffe v. Evans*, (1892) 2 Q.B. 524.

4. *Harrison v. Pearce*, (1858) 1 F. & F. 567; *Bluck v. Lovering*, (1885) 1 T.L.R. 497; *Ingram v. Lawson*, (1840) 6 Bing. N.C. 212, overruling in effect *Delegat v. Highley*, (1837) 8 C. & P. 444.

5. *Lynch v. Knight*, (1861) 9 H.L.C. at p. 598.

6. *Allsop v. Allsop*, (1860) 5 H. & N. 534.

7. Above, Chap. II, para. 5. 8. Odgers, p. 317.

9. *Darley Main Colliery Co. v. Mitchell*, (1886) 11 A.C. 127, 145, 146; *West Leigh Colliery Co. v. Tunnicliffe*, (1908) A.C. at pp. 31, 32.

libel and slander of that kind in England will apply. The second requirement above referred to requires consideration.

87. Causal relation of special damage.—The rules governing causal relation are discussed at a later stage but their application in this context requires notice here on account of a certain peculiarity in the case-law. The peculiarity is that the older cases appear to have strained the rule of causation against plaintiffs with a view to discourage actions for defamation.¹ These cases are now more properly regarded as decisions on the particular facts than as authority for any special rules inconsistent with those in force in other parts of the law. The question arises usually in two types of cases: (a) damage arising from the conduct of a third party acting under the influence of the libel or slander, as where he discharges the plaintiff from his employment; (b) damage due to repetition by a third party.

88. Damage due to conduct of a third party.—The general rule is that the defendant is liable if he intended, authorised, or was under a duty to anticipate and avoid damage arising from a third party's conduct.² Whether a duty exists depends on the facts. In *Vicars v. Wilcocks*,³ the plaintiff alleged that he was discharged by his employer in breach of his contract by reason of slanderous words spoken to the latter by the defendant. Lord Ellenborough ruled that the defendant was not liable for the illegal act of a third party. This doctrine has been disapproved in later cases.⁴ In *Bowen v. Hall*,⁵ it was held that a person was liable for inducing or procuring another to commit a breach of contract with a third person. Brett, M. R., observed that even wilful or illegal acts of third parties may be natural consequences and a rule which would not recognise them as such would in some cases be opposed to manifest truth and fact; and that if Lord Ellenborough's judgment required the doctrine for its support, it was wrong. In *Lynch v. Knight*,⁶ the plaintiff alleged that the defendant told the plaintiff's husband that she was a notorious liar and was all but seduced by a Dr. C. before her marriage and that in consequence her husband gave up her society. The House of Lords held that the damage was not the natural consequence of the slander, as the charge being not of unchastity but only of levity of conduct was not so grave as to make a reasonable man act as the husband did; Lord Wensleydale (Baron Parke) was inclined to hold the contrary as the slanderer could reasonably have

1. Below, Appx. para. 1.

2. *Speight v. Gosnay*, (1891) 7 T. L. R. 239, per Lopes, L. J.; *Weld-Blundell v. Stephens*, (1920) A. C. 956 at p. 999, per Lord Wrenbury. 3. (1806) 8 East. 1.

4. *Lynch v. Knight*, (1861) 9 H. L. C. 577; see also *Knight v. Gibbs*, (1834) 1 A. & E. 43; Sm. L. C., Vol. II, p. 503.

5. (1851) 6 Q. B. D. 333.

6. Above.

foreseen such a result. In *Speake v. Hughes*,¹ the plaintiff alleged that the defendant falsely told the plaintiff's employers that he left the defendant's premises owing him a month's rent, and thereupon they dismissed him from his employment. It was held that the damage was too remote. Collins, M. R., observed that the defendant could only have anticipated that the employers would put pressure on the plaintiff to pay the rent and not that they would dismiss him.

89. Damage due to repetition or republication.—The rule above set out will apply here also. For instance the defendant will be liable if he intended or authorised the repetition and will be presumed to have done so when he communicates a slanderous report to a notorious tale-bearer and tattler. He would also be liable when he as a reasonable person had a duty to anticipate the repetition. The duty would not arise merely from the fact that it is natural for persons to repeat slanders and "more than half of human kind are tale-bearers by nature."² A defamer is not ordinarily liable for the wilful repetition by another, but he may become liable if the latter was under a legal or moral duty to repeat and the defamer was aware of the facts which gave rise to that duty;³ as where A slandered B, a dressmaker, to C who told his wife who stopped her custom.⁴ There may be other cases where the defamer should have contemplated damage due to repetition.⁵ In *Rutcliffe v. Evans*,⁶ Bowen, L.J., in one of his famous judgments pointed out that under certain circumstances a slander of a trader (e.g., in a public place or in the presence of a large number of people) may lead to repetition by others resulting ultimately in loss of credit and custom, and that in such cases he can plead general loss of business as special damage and need not allege the names of particular customers to whom the defendant communicated his words. The plaintiff cannot of course complain of damage due to his or her own repetition.⁷ The cases on the question of liability for repetition are, however, not uniform. In *Ward v. Weeks*⁸ the defendant, Weeks, said of the plaintiff to Bryce

1. (1904) 1 K.B. 138; for other illustrations, see *Ashley v. Harrison*, (1793) 1 Esp. 48; *Kelly v. Partington No 2*, (1834) 5 B. & Ad. 645; *Miller v. David*, (1874) L.R. 9 C.P. 118; *Chamberlain v. Boyd*, (1883) 11 Q.B.D. 407; *Weldon v. DeBathe*, (1884) 54 L.J.Q.B. 113; *Societe Francaise des Asphaltes v. Farrell*, (1885) 1 C. & E. 563; *Dwyer v. Meehan*, (1886) 18 L.R. (Ir.) 138.

2. (1920) A.C. at p. 991, *per* Lord Sumner.

3. *Speight v. Gosnay*, (1891) 60 L.J.Q.B. 231.

4. *Derry v. Handley*, (1867) 16 L.T. 263.

5. Odgers, p. 336. It would not therefore be right to limit liability to cases where the repeater had a duty to repeat.

6. (1892) 2 Q.B. 124; cf. *Leatham v. Rank*, (1912) 57 Sol. J. 111.

7. *Parkins v. Scott*, (1862) H. & C. 153; see also *Speight v. Gosnay*, above.

8. (1830) 7 Bing. 211; as to this case, see *Riding v. Smith*, (1876) 1 Ex. D. 91; for other illustrations, see *Kendillon v. Maltby*, (1841) 1 Cr. & M. 402; *Dixon v. Smith*, (1860) 5 H. & N. 450; *Derry v. Handley*, (1867) 16 L.T. 263; *Argent v. Donigan*, (1892) 8 T.L.R. 432.

"He is a rogue and a swindler, and I know enough to hang him." Bryce reported this as Weeks's statement to Bryer who thereupon stopped supplying goods on credit to the plaintiff. Tindal, C. J., ruled that the defendant was not liable because the repetition of Bryce was the voluntary act of a free agent over which Weeks had no control and for which he was not answerable. In *Weld-Blundell v. Stephens*,¹ the plaintiff sued the defendant for the loss resulting to him from the republication of his libel brought about by the defendant's negligence. He had asked the defendant, an accountant, to investigate the affairs of a company in which he was interested and written to him a letter defamatory of two officers of the company. The defendant entrusted it to his partner who took it with him to the company's office and while speaking to the manager accidentally dropped it on the floor. Afterwards the manager picked it up and took copies of it and showed them to the officials defamed. They sued the plaintiff for libel and got damages on the ground that, as he had express malice, he lost his privilege. He now claimed the monies he had to pay as damages on the ground that the republication by the manager was the result of the defendant's breach of duty to keep the letter secret. The House of Lords² negatived this claim on the ground that the republication by the manager was the voluntary act of a free agent and was an independent cause for which the defendant could not be liable. As there was a clear breach of duty, nominal damages were awarded. With reference to this case, Scrutton, L.J., observed in the course of his judgment in *In re Polemis*:— "Perhaps the House of Lords will some day explain why, if a cheque is negligently filled up, it is a direct effect of the negligence that someone finding the cheque should commit forgery: *London Joint Stock Bank v. Macmillan*; ³ while if someone negligently leaves a libellous letter about, it is not a direct effect of the negligence that the finder should show the letter to the person libelled: *Weld-Blundell v. Stephens*." It is rather remarkable that the person who was admitted to be guilty of a breach of duty should not be responsible for the very thing which it was his duty to guard against.⁴ This decision is difficult to reconcile with well-established principles of causation discussed later.⁵ It is also open to the criticism that it regards *Ward v. Weeks* as authority for a rule which is obviously too broad and requires the qualifications discussed above. That rule, like the similar one in *Vicars v. Willocks*, was apparently the product of the restrictive policy formerly adopted in actions for

1. (1920) A. C. 957.

2. Lords Dunedin, Sumner and Wrenbury; Lords Finlay and Parmoor dissenting. The H. L. confirmed the C.A. where Scrutton, L.J., dissented, (1919) L.K.B. 520.

3. (1921) 3 K. B. at p. 577; as to the case see below, Chap. XIV, para. 64.

4. (1918) A. C. 777. 5. (1920) A. C. at p. 974, *per* Lord Finlay.

6. *Below*, Chap. XIV, para. 73.

slander.¹ The decision of the House of Lords proceeded also on the ground that the plaintiff could not complain of the consequences of his own wrongful act in publishing a malicious libel.²

90. **Costs.**—The general rule is that costs follow the event. But the judge has a discretion to vary it for good cause.³ He cannot deny costs merely because the plaintiff gets a very small sum as damages.⁴ He can however do so if he is satisfied that the action was frivolous, vexatious, or oppressive,⁵ and in a strong case make the plaintiff pay the defendant's costs.⁶ In a case of contemptuous damages, the plaintiff usually loses costs.⁷ The defendant may, even though the action fails, lose his costs by reason of his conduct, before or after trial, with reference to the action; e.g., if the action was provoked by his misconduct or folly.⁸ But he will not lose his costs merely because he succeeds on the statute of limitation.⁹ He may lose the costs on any issue where he failed. Since in many cases the costs amount to a large figure, the judge's power in this regard is a very substantial one by way of adjusting the equities of the case.¹⁰ It is another weapon of punishment besides the power of moulding damages.¹¹

1. As regards repetition it may be noted that the old cases denied relief against the slanderer on the ground that he was not liable for it on the principle of *Vicars v. Wilcocks*, and against the repeater if he repeated the words as those of the slanderer; *Earl of Northampton's case*, (1613) 2 Rep. at p. 134. The latter rule was overruled in *McPherson v. Daniels*, (1829) 10 B. & C. 253.

2. Below, Chap. XIV, para. 76. See also Chap. XIX, para. 27, note 1 as to validity of a contract not to disclose a libellous letter.

3. As to what is 'good cause', see *Forster v. Farquhar*, (1893) 1 Q.B. 564, per Bowen, L.J.

4. *Tipping v. Jepson*, (1906) 22 T.L.R. 743; *Martin v. Benson*, (1927) 1 K.B. 771; *Venkayya v. Surya Prakasamma*, I.L.R. 1941 Mad. 253.

5. E.g., *Harnett v. Vise*, (1880) 5 Ex. D. 307; *Williams v. Ward*, (1886) 55 L.J.Q.B. 566. 6. *Myers v. Financial News*, (1888) 5 T.L.R. 42.

7. In England as damages are awarded by a jury, their opinion of a plaintiff may not be the same as the judge's and a farthing damages has sometimes carried costs; *Mucalister v. Steadman*, (1911) 27 T.L.R. 217. See also *O'Connor v. Star Newspaper*, (1893) 68 L.T. 146 (a farthing damage for a malicious libel); *Cooke v. Brogden*, (1885) 1 T.L.R. 497.

8. *Sutcliffe v. Smith*, (1886) 2 T.L.R. 881; *Argent v. Donigan*, (1892) 8 T.L.R. 432 (the defendant succeeding in an action for slander only because the plaintiff failed to prove damage). 9. *Elms v. Hedges*, (1906) 95 L.T. 145.

10. Under the Slander of Women Act, 1891, a plaintiff cannot recover more costs than damages except on the judge's certificate that there was reasonable ground for bringing the action. It has been suggested that a similar rule for all defamation actions would be a salutary check on them; Ball, *Law of Libel affecting Newspapers*, p. 129; above, para. 6.

11. The jury cannot in assessing damages take costs into account; *Kelly v. Sherlock*, (1866) L.R. 1 Q.B. 636, 691, 692; *Best v. Osborne & Co*, (1896) 12 T.L.R. 419.

APPENDIX.

Rules of the English law of slander.

1. Peculiarity of the law of slander.—The rule requiring proof of special damage and its exceptions have been already set out. Before discussing them, it may be useful to bear in mind a peculiarity of the case-law on slander. In the sixteenth century the courts of common law began to entertain cases of defamation for the first time. Till then parties went to the ecclesiastical courts for redress against the slanderer. Scarcely had the judges of the King's Courts begun to allow such action when there was such a flood of litigation arising mostly out of vulgar abuse and petty quarrels that they had to seek ways of discouraging it. They adopted the policy of construing allegations of slander strictly, or as it was said, '*in nitiori sensu*,' and carried it to such extremes that they twisted even patent slanders into a non-defamatory sense. Their interpretation of the rules of actionability was influenced by the same policy and was rigid and artificial. The precedents of the sixteenth and early seventeenth centuries present these features and their influence can be traced even in cases of later times.

2. Rule as to special damage.—(a) *Meaning of the term.*—The term 'special damage' is ambiguous and misleading as it means different things in different contexts. It means one thing in the case of slander, another in the case of libel,¹ and yet another in the case of other torts like malicious prosecution or public nuisance. In this context it means actual damage or 'definite temporal loss' *e.g.*, loss of business² of custom,⁴ of a job or employment,⁵ of property, of a gift or legacy,⁶ of a proposed marriage,⁷ of the society of the husband,⁸ expulsion from a club⁹ or other secular society or association but not from a religious society or chapel.¹⁰ It does not include mere loss of friends¹¹ or their society, goodwill and regard, though loss of their hospitality¹² is treated as sufficient. Actual loss is what is required and not a mere chance or risk of loss.¹³ Mental pain, sorrow or disgrace is not enough.¹⁴ The terms 'damage' and 'special damage' are not so restricted in other contexts; for instance, in the case of malicious prosecution, they include loss of reputation.¹⁵

1. See Bowen, L.J., in *Ratcliffe v. Evans*, (1892) 2 Q.B. 524; Spencer Bower, p. 30.

2. *Per Tindal, C.J.*, in *Mulachy v. Soper*, (1836) 3 Bing. N.C. 371, 385, 386; *per Fletcher-Moulton, L.J.*, in *West v. West*, (1911) 27 T.L.R. 478.

3. *Storey v. Chullands*, (1837) 8 C. & P. 234; *King v. Watts*, (1838) 8 C. & P. 614.

4. *Ratcliffe v. Evans*, above.

5. *Martin v. Strong*, (1836) 5 A. & E. 535; *Rumsey v. Webb*, (1842) 11 L.J.C.P. 129.

6. *Hartley v. Herring*, (1799) 8 T. R. 130; *Corcoran v. Corcoran*, (1857) 7 Ir. C.L.R. 272. 7. *Davis v. Gardiner*, (1593) 4 Rep. 16.

8. *Lynch v. Knight*, (1861) 9 H.L.C. 577.

9. *Chamberlain v. Boyd*, (1883) 11 Q.B.D. 407 at 416.

10. *Roberts v. Roberts*, (1864) 5 B. & S. 384.

11. *Barnes v. Bruddel*, (1669) 1 Vent. 4; *Weldon v. DeBathe*, (1884) 33 W.R. 328.

12. *Moore v. Meagher*, (1807) 1 Taunt. 39; *Davis v. Solomon*, (1871) L.R. 7 Q.B. 112; *Clarke v. Morgan*, (1878) 38 L.T. 354; *West v. West*, (1911) 27 T.L.R. 189, 476.

13. *Chamberlain v. Boyd*, (1833) 11 Q.B.D. 407; *Michael v. Spiers*, (1909) 25 T.L.R. 740. 14. *Allsop v. Allsop*, (1860) 5 H. & N. 534.

15. *Savile v. Roberts*, (1698) 1 Ld. Raym. 374.

(b) *Direct consequence*.—Special damage must be the direct consequence of the slander.¹ The rules on this subject have already been considered.²

5. **Exceptions to the rule requiring special damage.**—(1) The imputation must be of a crime punishable corporally and not merely with fine or with imprisonment on default of payment of fine.³ In England adultery is not a crime punishable by the secular courts but only an ecclesiastical offence carrying spiritual penalties, and therefore an imputation of adultery is not actionable *per se*. In India it is otherwise as adultery is a crime.⁴ Words like 'thief' or 'murderer' or imputations of general criminality like 'I know enough to hang you or to put you in prison' are actionable.⁵ But mere words of scurrilous abuse like 'damned thief' or 'cheat' are not,⁶ nor words imputing general misconduct like fraud, vice or dishonesty.⁷

2. The disease imputed must be one which suggests disgraceful or immoral conduct and tends to exclude the plaintiff from society *e.g.*, venereal disease.⁸ It does not include diseases like small-pox. The imputation must be of a present complaint and not one which the plaintiff suffered from in the past.

3. The words must be spoken of the plaintiff in relation to his office, profession or trade, that is, must be connected with or touching the discharge of his duties therein. Therefore a general charge of immorality against a doctor⁹ of schoolmaster¹⁰ is not actionable; but an exception is made in favour of beneficed clergymen.¹¹ Words imputing to a person unfitness for an office or misconduct¹² in it, or insolvency to a trader¹³ are actionable. In the case of honorary offices a mere charge of unfitness and not of

1. On the general question of causation, see below, Chap. XIV, para. 62, etc.

2. Above, para. 87, etc.

3. *Webb v. Beavan*, (1889) 11 Q.B.D. 609; *Marks v. Samuel*, (1904) 2 K.B. 287; *Hellwig v. Mitchell*, (1910) 1 K.B. 609; *Michael v. Spiers*, (1909) 101 L.T. 352; *Lyons & Co. Ltd. v. Lipton, Ltd.*, (1914) 49 L.J. 542 (to say of a company that it is composed of alien enemies); *Ormiston v. G. W. Ry. Co.*, (1917) 1 K.B. 598. The offence may be punishable even summarily, *Webb v. Beavan*, above. Words importing a past conviction are actionable *per se*; *Gray v. Jones*, (1939) 1 A.E.R. 793.

4. *Hirabai v. Edulji*, (1926) 1 L.R. 51 Bom. 167; above, para. 5.

5. *Webb v. Beavan*, above; see also *Tempest v. Chambers*, (1815) 1 Stark 67; *Tomlinson v. Brittlebank* (1833) 4 B. & Ad. 630; *Francis v. Rose*, (1838) 3 M. & W. 191; but words suspecting and not definitely imputing a crime will not do; *Simmons v. Mitchell*, (1880) 6 A.C. 156; a charge of bringing a blackmailing action, held actionable as on the facts there was an imputation of supporting the action with false evidence; *Marks v. Samuel*, (1904) 2 K.B. 287.

6. *Per Mansfield, C.J.*, in *Thorley v. Lord Kerry*, (1812) 4 Taunt. at p. 356.

7. Formerly in England the process of strict construction of imputations of crime was carried to absurd lengths; for illustrations, see Odgers, Libel and Slander, pp. 112, 137; Holdsworth, Vol. VIII, pp. 353, 360.

8. *Bloodworth v. Gray*, (1844) 7 M. & Gr. 334; see *Watkin v. Hall*, (1868) L.R. 3 Q.B. 396, *per Blackburn, J.*

9. *Ayre v. Craven*, (1834) 2 A. & E. 2; see also *Lumby v. Allday*, (1831) 1 Cr. & J. 301, 305 (a similar charge against a clerk in a gas company).

10. *Jones v. Jones*, (1916) 2 A.C. 481. Cf. *De Stempel v. Dunkels*, (1938) 1 A.E.R. 238.

11. *Jones v. Jones*, (1916) 2 A.C. at pp. 401, 498, 508; (1916) 1 K.B. at pp. 361, 362; see also *Robinson v. Marchant*, (1845) 14 L.J.Q.B. at p. 136; *Gallwey v. Marshall*, (1853) 9 Ex. at p. 299.

12. *Foulger v. Newcomb*, (1867) L.R. 2 Ex. 327; *Thomas v. Moore*, (1918) 1 K.B. 555.

13. *Brown v. Smith*, (1853) 13 C.B. 596.

misconduct will not suffice. In *Alexander v. Jenkins*¹ it was held that to say of a town councillor, "he is never sober, and is not a fit man for the council; on the night of the election he was so drunk that he had to be carried home," was not actionable as it charged only unfitness for an office of honour. Similarly it was held not actionable to say of a justice of the peace that he was a "beetle-headed justice and an ass."² A barrister's profession is considered for this purpose a paid one though his fees are honoraria in theory; therefore to call him a dunce or to say that he knows no law is actionable *per se*.³ In *Dawncay v. Holloway*⁴, it was held not actionable without proof of damage to say of a solicitor that he has 'lost thousands' or 'gone for thousands,' and it was also observed that even an imputation of bankruptcy would not be actionable as he may be yet fit to carry on his duties. The office or trade must be one carried on by the person at the time the words were spoken.⁵

4. Origin of the distinction between slander and libel.—The peculiar rules of the law of slander are survivals from an earlier stage of legal development in England.⁶ They are in part due to the manner in which the King's courts encroached on the jurisdiction of their older rivals, the ecclesiastical courts. For instance, the rule as to special damage may be traced to the claim which they put forward at a very early time to give relief in cases where the parties aggrieved wanted a monetary compensation.⁷ After the Reformation the courts of the church had lost their importance and their jurisdiction passed to the royal courts.⁸ By the sixteenth century an action on the case of defamation had been introduced in the courts of common law. It was primarily available, like other actions on the case, only in cases of actual damage. It was extended to cases where damage was likely, *e.g.*, imputations affecting trade or calling, or alleging diseases tending to exclusion from society. Hardly had a new remedy been provided for this wrong, when it led to a flood of litigation of an undesirable type. The courts met this danger by regarding the categories in which actions had so far been allowed as final and placing a strict construction on their scope as well as on words complained of as defamatory. This was the position as regards both slander and libel, but in times when printing was unknown and few could read or write, defamation would usually be only spoken. In the seventeenth century printing had come into vogue and libels on high personages were a special feature of the time. The Court of Star Chamber punished the authors of these and other libels on the ground that they led to breaches of the peace.⁹

1. (1892) 1 Q. B. 797; see also *Booth v. Arnold*, (1895) 1 Q. B. 571.

2. *How v. Prinn*, (1703) 2 Salk. 694.

3. *King v. Luke*, (1672) 2 Vent. 28; *Banks v. Allen*, (1616) 1 Roll. Abr. 54.

4. (1901) 2 K. B. 441; see *Doyly v. Roberts*, (1887) 3 Bing. N. C. 835 (the plaintiff, an attorney, was said to have "defrauded his creditors and been horse-whipped off the course at Doncaster"; words held not actionable).

5. *Per De Grey, C. J.*, in *Onslow v. Horne*, (1771) 3 Wills. 177.

6. On this subject see *Jones v. Jones*, (1916) 2 A. C. 481; L. Q. R., Vol. X, p. 158 and Vol. XVIII, pp. 255, 388; Veeder, *Anglo-American Essays in Legal History*, Vol. III, p. 456; Spencer Bower, p. 282; and Holdsworth, Vol. VIII, p. 333.

7. (1285) 13 Ed. 1 Stat. 4, *Circumspecte Agatis*, cl. 12. Similarly the rule as to imputation of crime had its origin in the circumstance that persons convicted of crimes by the royal courts accused the complainants of defamation in the ecclesiastical courts. Thereupon the former issued writs of prohibition to stop such cases and ultimately asserted jurisdiction over imputations of offences punishable by them; see *Palmer v. Thorpe*, (1684) 2 Co. Rep. 20 A.

8. Above, Chap. I, para. 9.

9. The case *De Libellis Famosis*, (1606) 5 C. Rep. 125 (a) was the starting point of the English law of libel.

When this court was abolished in 1640 and the common law courts took over its jurisdiction, they adopted its rule that libel was punishable unlike slander. In 1670 Chief Baron Hale declared that, in an action on the case for written words, unlike slander, proof of damage was not required.¹ In that way the action for libel became an exception to the general rule which formerly prevailed as regards actions for defamation and which now survives in the case of slander alone. The desire to punish political libels and libels on high personages led the courts to adopt the rule of natural and reasonable construction and discard the old rule of strict construction.² This practice in libel cases reacted on the law of slander and the old rule ultimately disappeared from the law of defamation.³ Though the rules as to slander are irrational, judges have observed that any extension of the remedy would encourage undesirable litigation.⁴ Parliament intervened in 1891 to protect women from slander about their chastity;⁵ but in other respects it left the law intact.⁶

1. *King v. Lake*, (1670) Hardres 470; Skinner, 124. As to the reasons for the court taking this view, see Holdsworth, Vol. VIII, p. 364. Hale's rule was accepted by Lord Mansfield in *Thorley v. Lord Kerry*, (1812) 4 Taunt. 355.

2. The first instance was a case of *scandalum magnatum*; *Lord Townsend v. Hughes*, (1676) 2 Mod. 150.

3. See *Harrison v. Thornborough*, (1714) 10 Mod. 196; *Roberts v. Camden*, (1807) 9 East. 93; *Tomlinson v. Brittlebank*, (1833) 4 B. & Ad. 630. As regards pleadings, the colloquium and prefatory averments were abolished by the Common Law Procedure Act, 1852, s. 61; see also R.S.C., O. 19, r. 4.

4. *Dawncsey v. Holloway*, (1901) 2 K.B. at 448, *per* Vaughan Williams, J.; *Jones v. Jones*, (1916) 2 A.C. at p. 499, *per* Lord Sumner.

5. The Slander of Women Act, 1891. Unchastity includes homo-sexual practices or lesbianism; *Kerr v. Kennedy*, (1942) 1 A E R. 412.

6. By the Law of Libel Amendment Act, 1883, protection was given to reports of speeches at public meetings in view of the anomaly that otherwise the reporter was liable while the speaker was not.

CHAPTER VIII.

MALICIOUS PROSECUTION AND MAINTENANCE.

1. **Malicious prosecution and maintenance.**—The wrongs known as malicious prosecution and maintenance consist in causing damage by means of an abuse of the process of courts of law. The perversion of the machinery of justice for improper purposes is an evil which inevitably follows the establishment of judicial institutions. It assumed grave proportions in mediæval England.¹ The attempts of the state and its courts to put down this evil account for a large body of law, enacted and unenacted, in England.² Certain statutes passed in the thirteenth and fourteenth centuries were the foundation for the remedies for the wrong now under consideration. The comparatively large body of case-law and litigation in India on the subject of malicious prosecution would suggest that the said evil is prevalent here to a considerable extent.

2. **Malicious prosecution.**—This is the modern name of the wrong for which the remedy is an action of the same name. In the mediæval common law, the remedy was known as the writ of conspiracy provided by the Statute of Conspirators.³ It was originally, like the writ of trespass, both civil and criminal in its process. It lay against persons who conspired to indict another for a felony, but not against a single defendant, as conspiracy was the essence of the remedy. On account of this and other restrictions, an action on the case in the nature of conspiracy was allowed at a later time and came to be known as the action for malicious prosecution. This action lay even against a single defendant and in respect of indictments not only for felony but for any other crime, and ultimately for any abuse of process, civil or criminal. The gist of the action was not conspiracy, but damage.⁴ The phrase 'malicious prosecution' has thus become the name of the tort. It is used sometimes to refer to the prosecution or proceeding causing damage, and also to the action or remedy for malicious prosecution.

1. For an account of it, see Holdsworth, Vol. III, p. 394; *Nevil v. London Express Newspaper*, (1919) A.C. at p. 427.

2. Certain offences were made punishable and were known by names which then had a special and limited significance, *vis.*, forgery (using a forged document in a court of law), perjury (perjury of jurors), conspiracy (to indict for a felony), deceit (in the course of legal proceedings as by personation), champerty, maintenance, embracery (corrupting a juror); see Holdsworth, Vol. III, p. 400.

3. (1293) 21 Ed. I. On this subject, see Holdsworth, Vol. III, pp. 401-407; Vol. VIII, pp. 378, 385; Winfield, *History of Conspiracy and Abuse of Legal Procedure*, p. 22; 36 L.Q.R. 359. There was an older remedy, *vis.*, the writ "*de odio et atia*" for procuring the release of a person who had been 'appealed' out of hatred and malice. The mediæval statutes were repealed by the Statute Law Revision Act, 1887.

4. *Savile v. Roberts*, (1699) 1 Ld. Raym. 374. In *Ali Muhammad v. Zahir Ali*, (1931) I.L.R. 53 All. 771, 773; 1931 A.L.J. 611, Bennet, J.'s remark that only the two latter heads of damage are recognised in India appears, with respect, to be open to question.

3. **Damage.**—In *Savile v. Roberts*,¹ the leading authority which established the tort of malicious prosecution in its modern form, Holt, C. J., held that the gist of the action was damage, and defined it to be one of three kinds: “first, damage to a man’s fame as if the matter whereof he is accused be scandalous; second, damage to the person, as where a man is put in danger to lose his life, or limb, or liberty; and third, damage to his property, as where he is forced to expend his money in necessary charges to acquit himself of the crime of which he is accused.”

4. **Presumption of damage.**—Though damage is the gist of the action, it need not be proved but may be presumed. For instance, in the case of a prosecution for a crime which involves some slur on character, damage to reputation is presumed and need not be proved. If the crime is punishable, corporally, with loss of life or liberty, the second element of damage is also present. The third element may be proved by showing that expenses were incurred in the conduct of the defence. When the prosecution is for an offence which is only a technical breach of a statute or bye-law and does not reflect on moral character, there can be no presumption of damage to reputation. For instance, it was held that no action for malicious prosecution would lie in respect of a complaint under the Public Health Act for non-compliance with a notice to abate a nuisance on a person’s premises.² As the offence was punishable only with fine, damage of the second kind was also ruled out. Besides, as the prosecution ended in an acquittal and an order for costs to be paid by the complainant to the accused, damage of the third kind was also absent. Similarly it was held in Madras that a prosecution under the Cattle-trespass Act for illegally impounding cattle, an offence punishable only with fine, did not involve any injury to reputation.³

5. **Malicious institution of a suit.**—It has also been held that a malicious institution of a civil suit is not actionable. The reasons for this rule were expounded in *Quartz Hill Gold Mining Co. v. Eyre*.⁴ Damage of the first kind is absent because a man’s reputation does not or ought not to suffer from being sued. “When the action is tried in public, his fair

1. See above, p. 321, note 4.

2. *Wiffen v. Bailey*, (1915) 1 K.B. 600.

3. *Sriramulu v. Kolandavelu*, (1916) 31 M.L.J. 479 : 37 I.C. 374. In this case damage of the third kind *viz.*, for expenses was given up. Therefore none of the three kinds of damage could be found; cf. *Naik Pandey v. Bidya Pandey*, (1916) 1 Pat. L.J. 149 : 34 I.C. 149 (proceeding under s. 58 of the Bengal Tenancy Act is a prosecution); *Ahmedabad Municipality v. Panubhai*, 1935 Bom. 355 : 37 Bom. L.R. 468; *Jutindra v. Calcutta Corporation*, 1941 Cal. 19 (pleader prosecuted for practising without municipal licence, not a prosecution.)

4. (1883) 11 Q.B.D. 674. In *Albert Bonnan v. Imperial Tobacco Co.*, (1929) 50 C.L.J. 351 : 1929 P.C. 222, it was observed that the subject might require further consideration in future.

fame will be cleared, if it deserves to be cleared ; if the action is not tried, his fair fame cannot be assailed in any way by the bringing of the action."¹ The second head of damage is obviously out of the question. As regards the third, pecuniary loss resulting from being sued is generally made good by an order for costs in favour of the successful defendant. If costs are refused it means that he did not deserve to get them, and he cannot be allowed to get them by means of another action. As regards expenses incurred in excess of the costs decreed, they cannot be deemed necessary charges in law and are not therefore damage for which compensation can be claimed.² Apart from these reasons there is also the objection that if an action for malicious prosecution were allowed in respect of a civil suit, it could be followed by a string of actions of the same kind resulting in endless litigation. There are however some civil proceedings which cause damage to reputation ; e.g., proceedings for adjudging a person as a bankrupt,³ or for winding up a trading company.⁴

6. Malicious criminal prosecution.—In an action for a malicious criminal prosecution, the plaintiff must prove the following points⁵ : (a) that the plaintiff was prosecuted by the defendant, (b) that the prosecution ended in the plaintiff's favour, (c) that the defendant acted without reasonable and probable cause, (d) that the defendant was actuated by malice.

7. Prosecution.—The word 'prosecution' means a proceeding in a court of law charging a person with a crime. It includes, in India, a proceeding before a magistrate under the preventive sections of the Criminal Procedure Code for compelling a person to give security for keeping the peace or for good behaviour,⁶ or to abstain from interfering with another's possession of immovable property and thereby causing a breach of the peace.⁷ On the question whether there is a prosecution of a

1. *Per Bowen, L.J.*, 11 Q.B.D. at p. 690. See however a case where a trader's reputation was injured by a civil suit carelessly instituted against him and he was held to have no right of action ; *Corbett v. Burge*, (1932) 48 T.L.R. 626.

2. *Per Brett, M. R.* in 11 Q.B.D. at p. 682.

3. *Johnson v. Emerson*, (1871) L. R. 6 Ex. 329 ; *Wyatt v. Palmer*, (1899) 2 Q.B.D. 106.

4. *Quarts Hill Gold Mining Co. v. Eyre*, above.

5. *Balbhaddar Singh v. Badri Sah*, (1926) 1 Luck. 215 ; 51 M.L.J. 42 (P.C.) ; see also *Shubrat v. Shams-ud-din*, (1928) I.L.R. 50 All. 713 ; 26 A.L.J. 439 ; *Nagendra Nath v. Basanta Das*, (1929) I.L.R. 57 Cal. 25 ; *Thimmappa v. Ninge Gowda*, (1932) 10 Mys. L.J. 12 ; *Bhaguji v. Alandi Municipality*, 1937 Bom. 37 ; *Raja Braja Sunder v. Bamdeb Das*, (1944) 1 M.L.J. 46.

6. Ss. 107, 108, Crl. Pro. Code ; see *Bishun Prasad v. Phulman Singh*, (1914) 19 C.W.N. 935 ; 27 I.C. 449 ; *Crowdy v. Reilly*, (1912) 17 C.W.N. 554 ; 18 I.C. 737 ; *Sowrendra v. Sesi Bhushan*, (1918) 49 I.C. 232 (Cal.) ; *Chitranshi Singh v. Dharam Singh*, (1921) I.L.R. 43 All. 402 ; but see *Kandasami v. Subramanya*, (1902) 13 M.L.J. 370 (*contra*).

7. Ss. 144, 145, Crl. Pro. Code ; see *Gaya Prasad v. Bhagat Singh*, (1908) I.L.R. 30 All. 525 (P.C.) ; 35 I.A. 189 ; see also *Chaturbhuj v. Manji Ram*, 1936 All. 537 ; 1936 A.L.J. 594 ; *Narayana v. Peria Kalathi*, 1939 Mad. 783 ; as to a proceeding under s. 212 of Madras Act I of 1908, see *Bomnadevara Naganna v. Bomnadevara Venkatarayulu*, 1929 Mad. 286.

person before he is summoned to defend himself, some High Courts¹ take the view that there is none and there can be no action when a complaint is dismissed without notice to the accused, while others² hold that a prosecution commences as soon as a charge is made before a court and even before notice is issued. In any case a person to whom notice had not been issued cannot sue unless he makes out that damage to reputation actually resulted. Damage of the second and third kinds aforesaid is out of the question in his case. The term 'prosecution' includes not merely a proceeding in the trial court but further proceedings by way of appeal or otherwise,³ as well as an application for sanction of a civil or criminal court where such sanction is required to commence a prosecution.⁴ But it does not include a complaint to the police resulting only in a police investigation without a proceeding in court.⁵

8. **Prosecution by the defendant.**—The defendant is liable as prosecutor if he filed the complaint himself⁶ or through his agent or solicitor,⁷ or if the prosecution was by the police or the Crown at his instance and on his information.⁸ The question is, who is the real prosecutor, and the defendant's conduct before and during the trial will be material in deciding it.⁹ This is a question of fact

1. *Sheik Miran v. Ratnavelu*, (1912) I.L.R. 37 Mad. 181: 25 M. L. J. 1; *Sanjivi v. Koneri*, (1925) I.L.R. 49 Mad. 315: 50 M. L. J. 460; see also *Gur Saran v. Israr*, 1927 Oudh. 471; *Ali Muhammad v. Zakir Ali*, (1931) I.L.R. 53 All. 771: 1931 A.L.J. 611; cf. *Vater v. R.*, (1885) 14 Q.B.D. 648, 657.

2. *Ahmed Bai v. Framji*, (1903) I.L.R. 28 Bom. 226: 5 Bom. L. R. 940; *Bishun Prasad v. Phulman Singh*, (1914) 19 C.W.N. 935; see however *Golap Jan v. Bholanath*, (1911) I.L.R. 38 Cal. 880; *Zahiruddin Mohammad v. Budhi Bibi*, (1933) I.L.R. 12 Pat. 292; *Badal Khurangi v. Bhabooti*, I.L.R. 1942 Kar. 45: 1942 Sind. 141.

3. *Madan Mohan Singh v. Ram Sunder*, (1930) I.L.R. 52 All. 553: 1930 A.L.J. 885 (application under Crl. Pro. Code, s. 436).

4. *Mohamad Nias Khan v. Jai Ram*, (1919) I.L.R. 41 All. 503: 17 A.L.J. 776; *Fakir Chand v. Kushi Ram*, 1933 Lah. 735: *Nagarmull v. Jhaburmull*, (1933) I.L.R. 60 Cal. 1022.

5. *Nagendra Nath v. Basanta Das*, (1929) I.L.R. 57 Cal. 25; nor to a village Magistrate with a similar result; *Vaitappa v. Muthukaruppa*, 1941 Mad. 538.

6. It is no defence that he was bound over to prosecute; *Fitzjohn v. Mackinder*, (1861) 9 C.B.N.S. 505.

7. *Johnson v. Emerson*, (1871) L.R. 6 Ex. 329 (where the solicitor was sued and held liable). But see *Jambusar Municipality v. Girfashankar*, (1905) I.L.R. 30 Bom. 37 (Secretary prosecuting on behalf of Municipality not liable).

8. *Gaya Prasad v. Bhagat Singh*, (1908) I.L.R. 30 All. 525 (P.C.): 35 I.A. 189; *Ram Kishun v. Ram Narain*, 1934 Pat. 14.

9. *Gaya Prasad v. Bhagat Singh*, above; see also for other instances *Peria Goundan v. Kuppa Goundan*, (1919) I.L.R. 42 Mad. 880: 37 M.L.J. 234; *Radha Krishan v. Kedar Nath*, (1924) I.L.R. 46 All. 815: 22 A.L.J. 761; *Jagadambara Prasad v. Raghunandan Lal*, (1920) 57 I.C. 392 (Pat); *Venkatappayya v. Ramakrishnamma*, 1932 Mad. 53. For instance, in England, see *Cohen v. Morgan*, (1925) 6 D. & R. 8; *Dubois v. Keats*, (1840) 11 A. & E. 329; *Cotterell v. Jones*, (1851) 11 C. B. 713; *Barber v. Lesiter*, (1859) 7 C.B.N.S. 175; *Fitzjohn v. Mackinder*, (1860) 8 C.B.N.S. 78.

and the onus is on the plaintiff to prove the affirmative.¹ Where the defendant had merely given an account of his honest suspicion about the plaintiff to the police who without further interference on his part launched a case against the plaintiff, it was held he was not liable.² A person does not become a prosecutor by merely figuring as a witness in a criminal court.³ There is no civil remedy by way of an action for malicious prosecution or otherwise against a witness who gives false evidence; the only remedy is a prosecution for perjury.⁴ Where there is a prosecution in pursuance of a conspiracy between two or more persons, all are liable.⁵

9. **Termination of the prosecution in the plaintiff's favour.**—The plaintiff must prove that the prosecution ended in his favour. He has no right to sue before it is terminated and while it is pending.⁶ The termination may be by an acquittal on the merits and a finding of his innocence, or by a dismissal of the complaint for technical defects⁷ or for non-prosecution.⁸ If, however, he had been convicted he has no right to sue and will not be allowed to show that he was innocent and wrongly convicted.⁹ His only remedy in that case is to appeal against the conviction. If the appeal results in his favour, he can then sue for malicious prosecution. It is unnecessary for the plaintiff to prove his innocence as a separate issue.¹⁰ It would be however indirectly involved in the issue of absence of reasonable and probable cause.

10. **Absence of reasonable and probable cause.**—Reasonable and probable cause is a technical phrase in this context¹¹ and means that the

1. *Balbhaddar Singh v. Badri Sah*, (1926) 1 Luck. 215 (P.C.).
2. *Nagendra Nath v. Basenta Das*, (1929) I.L.R. 57 Cal. 25; *Raghubar Dayal v. Kallu*, 1940 All. 231.
3. *Shanmugha v. Kandasami*, (1920) 12 L.W. 170; 59 I.C. 973.
4. *Templeton v. Laurie*, (1900) I.L.R. 25 Bom. 230, 242; 2 Bom. L.R. 244; not even in a case of conspiracy to give false evidence; *Fakir Mahomed v. Fakir Mahomed*, 1937 Sind 44.
5. *Md. Sheriff v. Nasir Ali*, 1930 All. 742; 1930 A.L.J. 1443.
6. *Osumanyawa v. Nana Sirofi*, 1930 P.C. 260; see also *Gilding v. Eyre*, (1861) 10 C.B.N.S. at p. 604.
7. *Wicks v. Fentham*, (1791) 4 T.R. 247.
8. *Watkins v. Lee*, (1839) 5 M. & W. 270; *Asmat v. Aurban*, (1920) I.L.R. 42 All. 305; 18 A.L.J. 204.
9. *Basebe v. Matthews*, (1867) L.R. 2. C.P. 684; *Metropolitan Bank v. Pooley*, (1885) 10 A.C. 210.
10. *Balbhaddar Singh v. Badri Sah*, (1926) 1 Luck. 215 (P.C.); *Gopalakrishna v. Narayana*, (1918) 34 M.L.J. 517; 45 I.C. 803; *Pillappa v. Venkatasahanappa*, 8 Mys.L.J. 174. Before the P.C. ruling many cases held *contra*, and are of no authority now; e.g., *Harish Chunder v. Nishi Kanta*, (1901) I.L.R. 28 Cal. 591; *Gobardan v. Rambardan*, (1922) I.L.R. 44 All. 485; 20 A.L.J. 284. They did so by a literal reading of the observations of Bowen, L.J., in *Abrath v. N.E. Ry. Co.*, (1885) 11 Q.B.D. at p. 455.
11. As to the meaning of 'probable', see Salmond, Torts, p. 619; he observes that it is synonymous with 'reasonable' and means a probable or 'good' cause and that *probabilis causa* was not unknown to classical Latin. Justinian's Digest (D. 41; 10. 5) spoke of *probabilis error* in the sense of an error or mistake excusable on reasonable grounds. See also D. 50, 5. 7.

defendant believed in the plaintiff's guilt and that his belief was reasonable in the circumstances.¹ If the plaintiff establishes the negative of one of these two facts, he succeeds on this issue. The onus is on him to prove this issue and the facts involved in it, and not for the defendant to prove that he had reasonable and probable cause.² The issue is one of fact in the ordinary sense that it is a conclusion to be drawn from the circumstances.³ It is a question of law in England in the sense that it is for the judge and not for the jury to decide.⁴

10-A. Evidence of absence of reasonable and probable cause.—

Where it is shown that the defendant did not believe in the plaintiff's guilt, there is no reasonable and probable cause for him and he cannot be heard to say that the real facts which were unknown to him would make out the plaintiff's guilt.⁵ In such a case the defendant's conduct is conclusive evidence not merely of absence of reasonable and probable cause, but also of malice.⁶ Where it does not appear that the defendant had no belief in the plaintiff's guilt, the plaintiff must show that the defendant's conduct was unreasonable in the circumstances. Recklessness, haste, failure to make inquiries or test his information or grounds of suspicion would be evidence of such conduct. On the other hand the fact that he placed his information fairly before his lawyers⁷ or before the police⁸ would be evidence of the contrary. The existence of mere grounds of suspicion would not be reasonable cause.⁹ The plaintiff is bound to give some

1. *Corea v. Peiris*, (1909) A.C. 549; *Herniman v. Smith*; (1938) 1 A.E.R. 1 (H.L.); *Chenna Reddi v. Venkataswami*, (1919) 10 L.W. 314: 53 I.C. 70; *Sowrendra v. Sashi Bhusan*, (1918) 49 I.C. 232 (Cal.).

2. *Abrath v. N. E. Ry. Co.*, (1885) 11 Q.B.D. 440; *Quartz Hill Gold Mining Co. v. Eyre*, (1883) 11 Q.B.D. 674; *Chenna Reddi v. Venkataswami*, (1919) 10 L.W. 314: 53 I.C. 70; *Abdul Shukur v. Lipton & Co.*, 1924 Lah. 1. The plaintiff cannot interrogate the defendant to disclose his sources of information or the grounds he relies on for reasonable and probable cause; *Maas v. Gas Light & Coke Co.*, (1911) 2 K.B. 543.

3. *Mody v. Queen Insurance Co.*, (1900) I.L.R. 25 Bom. 332 (P.C.); it is not open to second appeal; *Vydinathier v. Krishnarwami*, (1911) I.L.R. 36 Mad. 375: 24 M.L.J. 515; *Chennareddi v. Venkataswami*, (1919) 10 L.W. 314: 53 I.C. 70; *contra*, that it is a mixed question of law and fact; *Nagendra Nath v. Basanta Das*, (1929) I.L.R. 57 Cal. 25; *Naik Pandey v. Bidya Pandey*, (1916) 1 Pat. L.J. 149: 34 I.C. 149. See also *Srinivasa Thatthachariar v. Thiruvankatachariar*, 1932 Mad. 601; *Madan Lall v. Lakshmi Narain*, 1939 Pat. 13; *Narayana v. Peria Kalathi*, 1939 Mad. 783. As to interference with conclusion based on credibility of witnesses, see *Mauji Ram v. Chaturbuj*, 1939 P.C. 225.

4. *Herniman v. Smith*, (1938) 1 A.E.R. 1 (H.L.). The judge may however put subsidiary questions of fact to the jury.

5. *Delegal v. Highley*, (1837) 3 Bing. N.C. 950.

6. *Puthu Lal v. Ram Sarup*, (1918) 16 A.L.J. 468: 46 I.C. 190; *Khader Unissa v. Balsha*, (1915) 2 L.W. 428: 29 I.C. 12; *Karuppanna Pillai v. Haughton*, (1936) I.L.R. 69 Mad. 887: 70 M.L.J. 695.

7. *Albert Bonnam v. Imperial Tobacco Co.*, (1929) 50 C. L. J. 351: 1929 P. C. 222; cf. *Nurse v. Rustomji*, (1923) 46 M.L.J. 353: 1924 Mad. 565.

8. *Herniman v. Smith*, (1936) 2 A.E.R. 1377.

9. *Clements v. Ohrlly*, (1847) 2 C. & K. 686; *Hogg v. Ward*, (1858) 3 H. & N. 417.

evidence which will *prima facie* suggest absence of reasonable and probable cause¹; if he does, the onus may then be shifted to the defendant to rebut it.² Whether mere proof of the plaintiff's innocence would be such evidence would depend on the facts of each case.³ For instance in the leading case of *Abrath v. N. E. Ry. Co.*,⁴ the defendants, a railway company, from whom a passenger had recovered compensation for physical injuries alleged to have been sustained in a railway accident, got information that he practised a fraud on them with the help of the plaintiff, a doctor, who certified about the injuries. They consulted their lawyers and on their advice prosecuted the plaintiff for conspiracy to defraud them. He was however acquitted. In an action for malicious prosecution, his innocence was admitted by the defendants. It was held that that was not enough; and his action failed because he gave no other evidence of unreasonable conduct on the part of the defendants. On the other hand if *A* prosecutes *B* for a crime which he says he saw *B* commit and *B* is acquitted on a plea of alibi, his innocence would be almost conclusive evidence of the defendant's dishonesty.⁵ Absence of reasonable cause may be proved also by showing that though the defendant was *bona fide* in commencing a prosecution, he persisted in it after the true facts had been disclosed.⁶ But facts elicited during the trial would not be evidence of absence of reasonable cause at the time of instituting the prosecution if the prosecutor was not then aware of them.⁷

1. *Abrath v. N. E. Ry. Co.*, (1885) 11 Q.B.D. 440, 449; *Gunesh Dutt v. Mugneeram*, (1872) 11 B.L.R. 283 (P. C.)

2. *Surendra Nath v. Bidhu Bhusan*, (1943) 48 C.W.N. 12.

3. *Badrisah v. Balbhaddar*, 1924 Oudh 145; (1926) 1 Luck. 215 (P. C.); *Bishan Swarup v. Bundrabun*, 1923 All. 531; *Abdul Shukur v. Lipton & Co.*, 1924 Lah. 1; *Madhu Lal v. Sahu Pande*, (1900) I.L.R. 27 Cal. 532; *Mahomad Haroon v. Ashar Hussain*, (1931) I.L.R. 10 Pat. 842; *Kishun v. Sakal Raj*, 1929 All. 878; *Pestonji v. Queen Insurance Co.*, (1900) I.L.R. 25 Bom. 332 (P.C.). But a judgment of acquittal by a criminal court is not evidence on this issue though it would prove the second point above; Indian Evidence Act, s. 43; *Rai Jung v. Rai Gudur*, (1897) 1 C.W.N. 537; *Gulabchand v. Chunni Lal*, (1907) 9 Bom. L.R. 1134; *Sheik Muchi v. Horsmul*, (1910) 17 C.W.N. 434; 19 I.C. 24; *Gobardhan v. Rambardan*, (1922) I.L.R. 44 All. 485; 20 A.L.J. 284; *Venkatapathi v. Balappa*, (1933) I.L.R. 56 Mad. 641; 65 M.L.J. 146; *Jiwan Das v. Hakumat Rai*, 1933 Lah. 461. That the plaintiff was convicted by the trial court and acquitted in appeal is held to be evidence *contra*; *Herniman v. Smith*, (1936) 2 A.E.R. at p. 1383, *per* Greer, L.J.; *Madho Singh v. Mangal*, 1924 All. 536; *Jag Narayan v. Bidapet Dubey*, (1923) 72 I.C. 409 (Pat.); *Bapuji v. Kishan*, 1926 Nag. 175; see however *Shubrati v. Shams-ud-din*, (1928) I.L.R. 50 All. 713; 26 A.L.J. 439. The parties may be able to use the depositions in the criminal court under s. 33, Indian Evidence Act.

4. 11 Q.B.D. 440; 11 A.C. 247.

5. *Mahomed v. Jai Lal*, 1929 All. 265; *Mohamudul Hasan v. Mohammed*, 1934 All. 696.

6. *Fitzjohn v. Mackinder*, (1861) 9 C.B.N.S. 505, 531; *Municipality of Jambusar v. Gritija Shanker*, (1905) I.L.R. 30 Bom. 37; *Shama Bibee v. Chairman of Baranagore Municipality*, (1910) 12 C.L.J. 410.

7. *Herniman v. Smith*, (1936) 2 A.E.R. 1377; (1938) 1 A.E.R. 1 (H.L.).

11. Malice.—Malice means an improper or indirect motive, *i.e.*, some motive other than a desire to vindicate public justice or private right.¹ It need not necessarily be a feeling of enmity, spite or ill-will. For instance, it may be a desire to obtain some collateral advantage.² This wrong must therefore be regarded as one of those exceptional cases in which malice in the sense of an improper motive is an essential ingredient. In *Allen v. Flood*,³ a general rule was propounded that an act lawful in itself does not become unlawful merely because of the bad motive of the actor, and some of their Lordships in the House of Lords suggested that malicious prosecution was not really an exception to this rule.⁴ This was explained by the theory that malice was material only by way of negating a just cause or excuse for prosecuting a person without reasonable and probable cause. The settled rule, however, is that malice is the gist of the action for malicious prosecution,⁵ and must be proved by the plaintiff in the first instance and not as in an action of defamation by way of rebuttal of the defence of privilege. The issue of malice is for the jury in England.⁶

12. Evidence of malice.—Malice may be proved by previous strained relations, unreasonable or improper conduct like advertising the charge, or getting up false evidence.⁷ Though mere carelessness is not *per se* proof of malice, unreasonable conduct like haste, recklessness, or failure to make enquiries would be some evidence.⁸ When there is absence of reasonable cause owing to the defendant's want of belief in the truth of his charge it is conclusive evidence of malice.⁹ But the converse of this proposition is not true, because a person may be inspired by malice and also have a reasonable

1. *Mitchell v. Jenkins*, (1833) 5 B. & Ad. 588, *per* Baron Parke; *Brown v. Hawkes*, (1891) 2 Q.B. 718, 723; *Nanjappa v. Ganapathi*, (1911) I.L.R. 35 Mad. 598; 21 M.L.J. 1052; *Jamnadas v. Chunni Lal*, (1920) I.L.R. 45 Bom. 227; 22 Bom. L.R. 1207; *Imperial Tobacco Co. v. Bonnan*, (1927) 46 C.L.J. 455; 1928 Cal. 1.

2. *Nurse v. Rustomji*, (1923) 46 M.L.J. 353; 1924 Mad. 565 (to bring pressure to settle civil suit); to teach a lesson to defaulters in payment of rates is not malice; *Changanlal Sakerlal v. Thana Municipality*, (1931) I.L.R. 56 Bom. 135; 34 Bom. L.R. 143; see also *Bansi v. Hukam Singh*, 1930 All. 216.

3. (1898) A.C. 1; see below, Chap. XIII, para. 9.

4. (1898) A.C. at pp. 125, 172, *per* Lords Herschell and Davey; also at p. 66, *per* Wright, J.; see Pollock, Torts, p. 325.

5. *Gaya Prasad v. Bhagat Singh*, (1908) I.L.R. 30 All. 525 (P.C.); *Albert Bonnan v. Imperial Tobacco Co.*, 1929 P.C. 222. In *Chenna Reddi v. Venkataswami*, (1919) 10 L.W. 314; 53 I.C. 70, Sadasiva Aiyar, J., deprecated the use of the term 'legal malice' in this context.

6. *Mitchell v. Jenkins*, (1833) 5 B. & Ad. 588.

7. *Alam Khan v. Banimiya*, (1925) 28 Bom. L.R. 459; 1926 Bom. 306.

8. *Vyadinadier v. Krishnaswami*, (1911) 35 Mad. 375; *Jamnadas v. Chunni Lal*, (1920) I.L.R. 45 Bom. 227; 22 Bom. L.R. 1207; *Shama Bibee v. Chairman, Baranagore Municipality*, (1910) 12 C.L.J. 410; 6 I.C. 675; *Chenna Reddi v. Venkataswami*, (1919) 10 L.W. 314; 53 I.C. 70.

9. *Brown v. Hawkes*, (1891) 2 Q.B. 718; *Karuppanna Pillai v. Houghton*, (1936) I.L.R. 59 Mad. 887; 70 M.L.J. 695.

belief in the truth of his case.¹ There may be malice either in commencing a prosecution or continuing one honestly begun.²

13. **Vicarious liability for malicious prosecution.**—A person may become liable for a prosecution instituted by his agent under his authority express or implied. In such a case the malice of his agent will be imputed to him.³ It is on this principle that a corporation is liable for this tort, though it has no mind and cannot be guilty of malice.⁴ The agent will also be liable unless he was merely a ministerial agent, like a clerk or solicitor.⁵

14. **Other instances of malicious abuse of process.**—An action for malicious abuse of process lies in the following cases: a malicious petition or proceeding to adjudicate a person an insolvent,⁶ to declare a person a lunatic,⁷ or to wind up a company,⁸ to take action against a legal practitioner under the Legal Practitioners Act,⁹ maliciously procuring arrest or attachment in execution of a decree¹⁰ or before judgment,¹¹ order of injunction¹² or appointment of a receiver,¹³ arrest of a ship,¹⁴ search of the plaintiff's premises,¹⁵ arrest of a person by the police.

1. *Johnstone v. Sutton*, (1786) 1 T.R. at p 544; *Herniman v. Smith*, (1936) 2 A.E.R. at pp. 1385, 1390; *Rafichunder v. Shama Sundari*, (1879) I.L.R. 4 Cal. 583, 587.

2. *Rabindra Nath v. Jogendra Chandra*, (1925) I.L.R. 56 Cal. 432; 33 C.W.N. 79; *Vithoba v. Bhimar*, 1925 Nag. 216; *Abdul Shakur v. Lipton & Co.*, 1924 Lah. 1.

3. Cf. *Lodd Govindas v. Arumuga*, 1937 Mad. 676.

4. *Abrath v. N. E. Ry. Co.*, (1885) 11 Q. B. D. 440.

5. *Johnson v. Emerson*, (1871) L. R. 6 Ex. 329.

6. *Johnson v. Emerson*, (1871) L.R. 6 Ex. 329; *Murugappa v. Galliera*, 1935 Rang. 367.

7. *Sriramulu v. Kolandavelu*, (1915) 31 M. L. J. 479; 37 I. C. 374; Cooley, Torts, Vol. 1, pp. 344, 443.

8. *Quartz Hill Gold Mining Co. v. Eyre*, (1883) 11 Q.B.D. 674.

9. *Babu Ram v. Nityanand*, I.L.R. 1939 All. 224; 1939 A. 168.

10. *Medina v. Grove*, (1847) 10 Q.B. 172; *Churchill v. Siggers*, (1854) 3 E. & B. 929; *Clisrold v. Gratchley*, (1910) 2 K.B. 244; *Velji Bhimsey v. Bachoo*, (1924) I.L.R. 43 Bom. 691; *Sudhangsu v. Hari Churn*, (1932) 56 C.L.J. 29; 139 I.C. 433; *Padmanabh v. Jagannath*, (1935) A.W.R. 1386; but not if a warrant of arrest is taken out against a witness; *Ram Kishen v. Basdev Lal*, 1934 Lah. 170.

11. *Nanjappa v. Gunapathi*, (1911) I.L.R. 35 Mad. 598; 21 M. L. J. 1052; *Nicholas v. Sivarama Iyer*, (1922) I.L.R. 45 Mad. 527. The alternative remedy under s. 95, C.P.C. if decided upon bars a suit. As to this remedy, see *Palanisami v. Kaliappa* 1940 Mad. 77.

12. *Harikumar v. Jagat Bandu*, (1926) I.L.R. 53 Cal. 1008; *Rama Rao v. Somasundaram*, (1927) I.L.R. 51 Mad. 642; 54 M.L.J. 647; *Misrajiil v. Babu Ram*, 1943 A.L.W. 601; see also *Bhut Nath v. Chandra Binode*, (1912) 16 C.L.J. 34; 16 I.C. 443; *Mohini Mohan v. Surendra*, (1914) I.L.R. 42 Cal. 550 (no suit in respect of a perpetual injunction); below, Chap. XI, para. 23.

13. *Binda Prasad v. Ram Chandar*, (1921) I.L.R. 43 All. 452; 19 A.L.J. 277.

14. *Redway v. McAndrew*, (1873) L.R. 9 Q.B. 74; *The Walter D Wallat*, (1893) P 202; *Madras Steam Navigation Co. v. Shalimar Works*, (1914) I.L.R. 42 Cal. 85.

15. *Jones v. German*, (1897) 1 Q.B. 374; *Wyatt v. White*, (1860) 29 L.J. Ex. 193; *Lea v. Charrington*, (1889) 23 Q.B.D. 45; *Syamanandan v. Ram Jivan*, 1924 Pat. 817; *Weston v. Peary Mohun Das*, (1928) I.L.R. 40 Cal. 898. Another remedy is action for slander against the informant and for trespass against the police; *Bajji Sahu v. Chedi*, 1939 Pat. 89.

15. Requirements of the action for malicious abuse of process.—

To the above cases the requirements of the action for malicious criminal prosecution already discussed will apply as far as possible. Damage is the gist of the action. Damage to reputation is presumed from malicious arrest of a person or attachment of a person's goods.¹ The first requirement of 'prosecution' can apply here only in a loose sense, because the process which is abused may be ministerial or executive and not judicial, *e.g.*, arrest or search by the police. The second requirement of 'a termination of the proceeding in the plaintiff's favour' will apply when the proceeding involves a judicial determination after contest, *e.g.*, a bankruptcy or liquidation petition; but not if the process can be obtained *ex-parte* and without any final determination of the proceeding, *e.g.*, interim attachment, arrest or injunction.² As regards malice or improper motive, its nature would differ in different cases. In a criminal prosecution the proper motive is to promote public justice and not any private interest. In the case of execution of a decree the proper motive is the protection of a private right. An attachment or arrest before judgment can be procured to prevent fraud of the debtor, but not to put pressure on him and obtain speedy payment of the debt.³

16. Difference between an action for malicious prosecution and an action for trespass.—

There are substantial points of distinction between an action for malicious prosecution and one for trespass to person like false imprisonment or trespass to property like seizure of goods.⁴ (a) In an action for malicious prosecution, the plaintiff has to prove absence of reasonable cause. In an action for trespass he has only to prove a trespass and it is for the defendant to prove a good cause or excuse.⁵ (b) In the former the plaintiff must prove malice. In the latter he need not, and it is no defence that the defendant had no malice but made a *bona fide* mistake. (c) Damage is the gist of the former but not of the latter form of action. In view of these points of distinction, the choice of the proper remedy is of

1. *Palani Kumarasamia Pillai v. Udayar Nidan*, (1903) I.L.R. 32 Mad. 170: 18 M.L.J. 490; *Nanjappa v. Ganapathi*, (1911) I.L.R. 35 Mad. 598; see also *Rama Iyer v. Govinda Pillai*, (1917) I.L.R. 39 Mad. 952: 30 M.L.J. 180 (but not from a mere order for attachment). Cf. *Mohamad Mustafa v. Mohammad*, 1940 Lah. 21.

2. *Gilding v. Eyre*, (1361) 10 C.B.N.S. 592; *Grainger v. Hill*, (1838) 4 Bing. N. C. 212; *Steward v. Gromett*, (1859) 7 C.B.N.S. 191; see *Nanjappa v. Ganapathi*, (1911) I.L.R. 35 Mad. 598: 21 M.L.J. 1052; *Joseph Nicholas v. Sivarama Ayyar*, (1922) I.L.R. 45 Mad. 527; *Nasiruddin v. Umerji*, 1941 Bom. 286 (distress warrant obtained by landlord).

3. *Nanjappa v. Ganapathi*, (1911) I.L.R. 35 Mad. 598; see *Surajmal v. Manekchand*, (1903) 6 Bom. L.R. 704; *Nevill v. Loadman*, (1860) 2 F. & F. 313.

4. For these and other points, *e.g.*, period of limitation, see *Kohini Kumar v. Nias Mohammad*, (1943) 77 C. L. J. 93.

5. *Mt. Chhabai v. Mt. Chunna Bai*, 1935 Nag. 237; *Qaim Husain v. Pirbhu*, 1938 All. 508.

great importance in cases of abuse of civil or criminal process. The choice is determined by the rule in *Austin v. Dowling* already discussed.¹ (d) If the act complained of was done under judicial sanction, then the remedy is an action for malicious prosecution or abuse of process.² An arrest or attachment in execution before judgment is an act of the court and therefore if a person procures it improperly against another he can be sued only in that form of action.³ If, however, the act complained of is not authorised by the order or warrant of the court, then the party who procures it can be sued for trespass without proof of damage or malice, e.g., seizure of property not specified in the warrant of attachment.⁴ The sheriff or other officer of court who makes the mistake would also be liable for a trespass.⁵ An action for malicious prosecution is the remedy where the defendant procures a police officer to arrest the plaintiff and the officer acts in the exercise of his discretion; but trespass lies if the police officer acts only as the agent of the defendant for arresting the plaintiff. Trespass is also the remedy when the act of a public official done at the instance of another is illegal and beyond his powers, e.g., an arrest or a search by a police officer not authorised by the Criminal Procedure Code.⁶

1. Above, Chap. II, para. 17.

2. *Ramanathan Chetty v. Meera Saiboo*, (1930) 61 M.L.J. 330, 333, per Lord Russell of Killowen; *Anthominuthu v. Naganatha*, 1942 Mad. 311.

3. Above, Chap. II, para. 17; see also *Rama Rao v. Somasundaram*, (1927) I.L.R. 51 Mad. 642; 54 M.L.J. 647; see however *Bhut Nath v. Chandra Binode*, (1911) 16 C.L.J. 34; 16 I.C. 443; *Chakrapani v. Venkataraju*, 1937 Mad. 647 (proceedings under s. 145, Cr. P. Code); *Hargovind v. Kikhabai*, 1938 Nag. 84 (proceedings under s. 133, Cr. P. Code). If there was a final determination then no suit will lie; *Thakid Haji v. Budruddin*, (1906) I.L.R. 29 Mad. 208. An action may lie also for breach of contract to certify discharge of decree; *Gopalaswami v. Nammalwar*, (1918) 36 M.L.J. 175. Under the English procedure the judgment-debtor's goods may be attached without the court's order and trespass would lie; *Glissold v. Cratchley*, (1910) 2 K. B. 244; see also *Churchill v. Siggers*, (1854) 3 E. & B. 929, 937 (attachment for full amount after part-payment); *Daniels v. Fielding*, (1846) 16 M. & W. 200 (arrest). Cf. Cases of search, *Hope v. Evered*, 17 Q.B.D. 338; *Lea v. Charrington*, (1889) 23 Q.B.D. 45.

4. *Ramanathan Chetty v. Meera Saiboo*, (1930) 61 M.L.J. 330; see also *Kissori Mohun Roy v. Harsukh Das*, (1889) I.L.R. 17 Cal. 436 (P.C.); *Abdul Rahim v. Sital Prasad*, (1919) I.L.R. 41 All. 658; *Bhusanachandra v. Norendra Nath*, (1920) 31 C.L.J. 495; 57 I.C. 375; 32 C.L.J. 236; 60 I.C. 280; *Velji v. Bachoo*, (1924) I.L.R. 48 Bom. 691. As to responsibility of party for the mistake of the officers of court, defendant held liable; *Painter v. Liverpool Gas Co.*, (1836) 3 A. & E. 433; *Morris v. Salberg*, (1889) 22 Q.B.D. 614; defendant not liable; *Sowell v. Champion*, (1837) 6 A. & E. 407; *Cronshaw v. Chapman*, (1862) 7 H. & N. 911; *Woollen v. Wright*, (1862) 1 H. & C. 554; *Smith v. Keal*, (1882) 9 Q.B.D. 340; *Wilson v. Tumman*, (1843) 6 M. & G. 236; *Fisher v. Pearse*, (1885) I.L.R. 9 Bom. 1. As to distinction between wrongful attachment in execution and attachment under Order 16, r. 10, C.P.C., see *Srinivasayya v. Lakshmayya*, 1937 Mad. 811.

5. *Glasspoole v. Young*, (1829) 9 B. & C. 696; see also *Hoye v. Bush*, (1840) 1 M. & G. 775; *Kelly v. Lawrence*, (1864) 3 H. & C. 1. The sheriff can sue the decree-holder for being indemnified against the consequences of acting on his instructions; *Humphreys v. Pratt*, (1831) 5 Blig. N.R. 154; 35 R.R. 41.

6. *Assan Alliar v. Masillamani*, (1918) I.L.R. 42 Mad. 446; 36 M.L.J. 252 (where the search was held legal); *Madhab Chandra v. Jugnoo Ram*, 1928 Cal. 231

17. Damages.—In an action for malicious prosecution, as in one for false imprisonment or defamation, damages represent, first, a solatium for injured feelings and reputation, physical detention and consequent suffering, and second, actual damage by way of pecuniary loss.¹ The first head of general damages is liable to aggravation and mitigation according to the circumstances of the case.² Under the second head will fall expenses incurred in getting an acquittal, like counsel's fees.³ In cases of attachment of goods, their deterioration or loss will have to be paid for.⁴

18. Maintenance.—Maintenance is the officious intermeddling by pecuniary or other assistance with another's litigation in which the intermeddler has no concern.⁵ Champerty is that form of it in which the intermeddler renders assistance by bargaining for a share of the profits of litigation. These evils were rampant in mediaeval England and were made punishable by various statutes.⁶ Later on, an action on the case was allowed against the maintainer at the instance of the person against whom the litigation was maintained.⁷ It is through this remedy that the tort of maintenance has come down to the law.

19. Points to be proved by the plaintiff in an action for maintenance.—In an action for this tort, the plaintiff must prove two points: (a) That the defendant procured another person by means of pecuniary assistance to institute, carry on or defend a civil suit against the plaintiff. If the defendant instigated a criminal prosecution, then the remedy is not an action for maintenance but for malicious prosecution against the prosecutor and his instigator.⁸ While in the latter form of action the plaintiff must prove a successful termination of the previous proceeding, in the former he need not. He has a right to complain merely of officious interference in a suit which he may have lost.⁹ (b) That the plaintiff sustained special damage in consequence.

1. *Baldeo Shukul v. Balbhadsar*, (1913) 27 I.C. 410; *Raghunath v. Motiram*, 1933 Nag. 299 (loss of employment); the plaintiff must prove such loss; *Gyasi Ram v. Kishore*, 1930 All. 165. 2. *Venkatapayya v. Ramakistamma*, 1932 Mad. 53.

3. In re *Sanjivi*, (1911) 9 M.L.T. 172; 8 I.C. 884; see *Gyasi Ram v. Kishore*, 1930 All. 165; *Karuppanna Pillai v. Haughton*, (1936) I.L.R. 59 Mad. 887; 70 M.L.J. 695.

4. *Kissorimohun v. Harsukh*, (1889) 17 Cal. 436 (P.C.); 17 I.A. 17; *Abdul Ruhim v. Sital Prasad*, (1919) I.L.R. 41 All. 658; *Raghunath v. Motiram*, 1933 Nag. 299. But not loss due to another attachment; *Qaim Husain v. Pirbhu*, 1938 All. 508.

5. Hawkins, P.C., Vol. I, p. 154.

6. Statute of Westminster, I (3 Ed. I) was the earliest. See *Neville v. London Express Newspaper*, (1919) A.C. 368, 426, 427; Holdsworth, Vol. III, pp. 395 to 398; Vol. VIII, pp. 397 to 402. They were also offences at common law.

7. (1331) 4 Ed. III, c. 11, Holdsworth, Vol. III, p. 397.

8. *Grant v. Thompson*, (1895) 72 L.T. 264.

9. *Neville v. London Express Newspaper*, above; Lord Shaw and Phillimore, *contra*. See also below Chap. XIV, para. 76.

20. Requirement of special damage.—In *Neville v. London Newspaper, Ltd.*,¹ the plaintiff was developing his estate in Sussex into a seaside resort and offered prizes of freehold land for persons who would suggest a suitable name for the place and send three guineas. A number of persons responded. The defendants published articles in their newspaper that the plaintiff's offer of lands was fraudulent and was really for sale at a profit and assisted a number of persons to file suits and recover the monies paid. The plaintiff who had to pay back the monies and costs sued the defendants for maintenance. The House of Lords held that the wrong of maintenance did not belong to the category of invasions of absolute rights for which nominal damages could be got but was actionable only on proof of damage. As for the damage complained of, it was the consequence of the plaintiff's own fraud and not of the defendant's wrongdoing and therefore the plaintiff's action failed. "It cannot be regarded as damage sufficient to maintain an action that the plaintiff has had to discharge his legal obligations or that he has incurred expenses in endeavouring to evade them."² The result of this decision is to make it extremely difficult for any person to complain of maintenance when he had lost the action maintained. It is otherwise if he had won it. In the well-known case of *Bradlaugh v. Newdegate*,³ the defendant instigated and assisted a person to file a civil suit against Charles Bradlaugh for recovery of the statutory penalty for sitting and voting in Parliament without taking the prescribed oath. The suit was dismissed on the ground that the plaintiff therein was not entitled to sue as common informer. Thereupon Charles Bradlaugh brought an action for maintenance against the defendant and recovered the costs incurred by him in the prior suit and not realised by him on account of the poverty of the plaintiff therein.

21. Defences.—In this action it is open to the defendant to show a lawful justification for assisting another's suit, *e.g.*, a common interest⁴ as between co-owners or between landlord and tenant, near relationship of the person assisted, motives of charity.⁵ It is no defence that the maintained suit resulted in favour of the plaintiff therein.⁶ This fact may, however,

1. Above; *per* Lords Finlay, Shaw and Phillimore; Lords Haldane and Atkinson, who dissented, held that nominal damages could be given.

2. (1919) A.C. at p. 380, *per* Lord Finlay.

3. (1883) 11 Q.B.D. 1; see also *Alabaster v. Harness*, (1895) 1 Q.B. 339.

4. *Bradlaugh v. Newdegate*, (1883) 11 Q.B.D. at p. 11; *British Cash and Parcel Conveyors, Ltd. v. Lamson Store Service Co.*, (1908) 1 K.B. 1006; cf. *Oram v. Hutt*, (1914) 1 Ch. 98.

5. *Harris v. Brisco*, (1886) 17 Q.B.D. 504; *Holden v. Thompson*, (1907) 2 K.B. 489. As to whether a solicitor can take up a speculative action on behalf of a poor client, see *Wiggins v. Lavy*, (1928) 44 T.L.R. 721. A New Zealand Court has held that he can; 51 L.Q.R. 575.

6. *Neville v. London Express Newspaper*, (1919) A.C. 368; Lords Shaw and Phillimore dissented. As to this point, see Holdsworth's criticism, Vol. VIII, p. 401.

disprove the causal connection between the damage and wrong complained of.¹

22. The wrong of maintenance in India.—In India the old English statutes against maintenance and champerty are not in force. Therefore, it has been held that an action for the tort of maintenance can lie here only on grounds analogous to those for malicious abuse of process.² While in England the mere officious assistance of another's litigation resulting in damage to the plaintiff is a cause of action, in India, the plaintiff must prove besides damage, his success in the previous suit, want of reasonable and probable cause, and malice. Malice means some improper motive like a desire to injure or harass the plaintiff, or a motive opposed to public policy like gambling in litigation.³ But it is not every agreement to supply funds for a suit in return for a share of the property that can be regarded as gambling. In India agreements stipulating for a transfer of property involved in litigation have often been enforced.⁴ In England they would offend the old statutes aforesaid and therefore are neither enforceable in an action on the contract nor good excuses in an action for the tort. In view of the restricted scope of the wrong, actions for maintenance can rarely arise in this country.⁵

1. Above, para. 20.

2. *Ram Coomar v. Chunder Canto*, (1876) I.L.R. 2 Cal. 233 (P.C.) : 4 I.A. 23.

3. I. L. R. 2 Cal. at p. 257.

4. *Bhagwant Dayal v. Debi Dayal*, (1908) I. L. R. 35 Cal. 420 (P.C.) : 35 I. A. 48; *Vatsavaya Venkata v. Poosapati*, (1924) I. L. R. 48 Mad. 230 (P.C.) : 52 I. A. 1.

5. For an old instance, see *Golap Chand v. Jeebun Coomaree*, (1875) 24 W. R. 437.

CHAPTER IX.

DECEIT.

1. The tort and its development.—The tort known as deceit in the modern law comprehends any false representation made by one person with intent to deceive another and resulting in damage to the latter. In England the term had formerly a limited significance. The writ of deceit (*breve de deceptione*) was in origin a remedy for fraud committed in the course of legal proceedings,¹ *e.g.*, by false personation of a party or witness. Later on, a variation of this writ, *viz.*, an action on the case in the nature of deceit was used as a remedy in certain cases of breach of contract; *e.g.*, fraudulent representation by a vendor of goods about their quality or his title, resulting in loss to the vendee.² It is to this action as well as the action of trespass on the case that the action of assumpsit of a later period owed its origin. In that way the action of deceit was identified for a long time with the law of contract. It was finally dissociated from it and assumed its modern form of an action for the tort, after the action of assumpsit had been fully developed as a special form of action for breach of contract.³ In *Pasley v. Freeman*,⁴ which was the starting point of the modern law of deceit, it was held that an action would lie for damage caused by a fraudulent representation though there was no contractual relation between the parties. "When damage and fraud concur an action lies; but fraud without damage or damage without fraud gives no cause of action."⁵ Accordingly the plaintiff recovered in that case for damage resulting from the defendant's false and fraudulent statement that a third party was a solvent person and the plaintiff could supply goods to him on credit. In England the action has served as a remedy against various forms of fraud in the course of commercial dealing. During the second half of the last century when joint-stock companies began to spring up, it served as a weapon against fraudulent promoters who deceived the public by false prospectuses.

1. Holdsworth, Vol. II, p. 366; Vol. III, pp. 401, 407; Street, Vol. I, p. 374. This writ was known from the time of King John (1201) and was earlier than the writ of trespass.

2. Holdsworth, Vol. III, pp. 407, 430, 431. An extension of it was where a client sued a lawyer for causing damage by colluding with his opponent. See also Street, Vol. I, p. 374; "The law of deceit is the matrix of assumpsit and it is therefore in effect the matrix of the greater part of modern contract law."

3. Holdsworth, Vol. VIII, pp. 67, 68, 426; *Sinclair v. Brougham*, (1914) A. C. 398, 417; *Nocton v. Ashburton*, (1914) A. C. 932, 947, *per* Lord Haldane. See also above, Chap. I, paras. 16 and 17.

4. (1789) 3 T. R. 51; 2 Sm. L. C. p. 71.

5. *Per* Lord Kenyon, C. J., in 3 T. R. at p. 64.

2. Points to be proved in the action.—In an action of deceit the plaintiff has to prove the following points¹ :

- (i) the defendant made a false representation,
- (ii) the defendant made it fraudulently, *i.e.*, knowing it to be false or not knowing it to be true,
- (iii) the defendant made it with the intent that the plaintiff should act on it,
- (iv) the plaintiff by acting on it sustained damage.

The plaintiff may also sue the defendant if a fraud as described above was committed by the defendant's agent or servant with his express or implied authority.

3. Representation.—It means here a representation of fact. It does not include a promise to do something in future. A failure to perform a promise may constitute a breach of contract but not the tort of deceit.² But a statement though in form a promise may really amount to a statement of fact.³ It is in any case a statement of fact as regards the promisor's intention to perform his promise.⁴ A warranty is really a promise and not a statement of fact. A person who sells a horse and warrants it to be sound is liable for breach of warranty if the horse is vicious; if he said he knew it was sound, he is liable for deceit.⁵ A statement of one's opinion, belief or hope is not a representation of the fact to which it relates.⁶ It is however a representation that the speaker or writer entertains the opinion, belief or hope, and if that is false and acted upon by another, the latter can sue for deceit,⁷ *e.g.*, a person advancing money on the strength of an expert's valuation,⁸ or of a banker's opinion of the credit of a customer,⁹ a person employing another on the strength of a false certificate given by the latter's ex-employer.¹⁰ Sometimes it may be difficult to show that a statement of opinion was acted upon; for instance, exaggerated or puffing statements by intending sellers are not usually acted upon as buyers are

1. Street stated the points as representation, falsity, scienter, deception and damage; Vol. I, p. 374.

2. *Ex parte Burrell*, (1876) 1 Ch. D. at p. 552.

3. *Clydesdale Bank v. Piton*, (1896) A.C. 381, 394; *Kettlewell v. Refuge Assurance Co.*, (1908) 1 K.B. 545.

4. *Ex parte Whittaker*, (1875) 10 Ch. at p. 449.

5. *Brownlie v. Campbell*, (1880) 5 A.C. 925, 953; *Low v. Bouverie*, (1893) 1 Ch. 82, 102.

6. *New Brunswick Ry. and Land Co. v. Conybeare*, (1862) 9 H.L.C. 711; *Melbourne Banking Corporation v. Brougham*, (1882) 7 A.C. 307, 319, 320.

7. *Edgington v. Fitzmaurice*, (1885) 29 Ch. D. 459; *Luddy's Trustee v. Beard*, (1886) 33 Ch. D. 500; *Cann v. Willson*, (1888) 39 Ch. D. 39; *Smith v. Land and House Property Corporation*, (1884) 28 Ch. D. 7.

8. *Re Mount Morgan West Gold Mine, Ltd.*, (1887) 55 L.T. 622, 624.

9. *Parson v. Barclay*, (1910) 103 L.T. 196.

10. *Foster v. Charles*, (1830) 6 Bing. 105; *Wilkin v. Reed*, (1854) 15 C. B. 192 (where the action failed).

expected to form their own judgment on the matter.¹ Similarly there may be difficulty in showing that an opinion on a matter of law was acted upon when both parties had an equal opportunity of knowing it.² But what is in form a statement of opinion may really amount to a representation of fact.³ When the plaintiff had proposed to let a policy taken by her and payable on the death of another lapse, and the agent of the defendants, an insurance company, told her that if she continued to pay the premia for four more years, she would get the policy without further payment, it was held that the statement amounted to a representation of fact as to the course of practice of the company, and as it was false and acted upon, the plaintiff was entitled to get back the premia.⁴ A statement about intention is one of fact. In *Edgington v. Fitzmaurice*⁵ the defendants issued a prospectus inviting subscriptions for debentures, the declared object of the loan being to complete buildings, buy vans and horses, and develop trade, whereas the true object was to pay off pressing liabilities. The defendants were held liable for an untrue representation of their intention in issuing the debentures. Bowen, L.J., observed that "the state of a man's mind is as much a fact as the state of his digestion." A statement of intention may in substance be really a promise in which case its author may not be liable for deceit.⁶

4. Form of representation.—The representation may be by means of words or gestures or by conduct. Words should be understood in their primary and normal sense and with reference to the context.⁷ The whole of the statement must be taken together to see whether it conveys a false impression. In the case of an ambiguous statement which bears two meanings one of which is false, its author is liable if he made it with intent

1. *Dimmock v. Hallet*, (1866) 2 Ch. at pp. 21, 27; *Central Railway Co. of Venezuela v. Kitch*, (1867) L.R. 2 H.L. 99, 113; *Tower v. Newcome*, (1810) 3 Mer. 704; 17 R.R. 171; similarly a seller cannot complain that he acted on a buyer's statement that he will not pay more than a certain price; *Vernon v. Keys*, (1812) 4 Taunt. 488.

2. *Rashdall v. Ford*, (1866) L.R. 2 Eq. 750.

3. *In re. Pacaya Rubber Co.*, (1914) 1 Ch. 542, 549, 553; *Bissett v. Wilkinson*, (1927) A.C. 177. As to opinions on matters of law, see *The West London Commercial Bank v. Kitson*, (1884) 13 Q.B.D. 260, 362; *Firbank's Executors v. Humphreys*, (1886) 18 Q.B.D. 54; *Lewis v. Jones*, (1825) 4 B. & C. 506; *Beattie v. Lord Ebury*, (1872) 7 Ch. 777; *Eaglesfield v. Marquis of Londonderry*, (1872) 4 Ch. D. 693.

4. *Kettlewell v. Refuge Assurance Company*, (1908) 1 K.B. 545; (1909) A.C. 247; see also *Hughes v. Liverpool Friendly Society*, (1916) 2 K.B. 482.

5. (1885) 29 Ch. D. 459; see also the remarks of the learned judge in *Angus v. Clifford*, (1891) 2 Ch. 449, 470.

6. *Hammersley v. De Biel*, (1845) 12 Cl. & F. 45; *Maunsell v. White*, (1854) 4 H.L.C. 1039; *Jorden v. Money*, (1854) 5 H.L.C. 185; *Maddison v. Alderson*, (1893) 8 A.C. 467.

7. *Arnison v. Smith*, (1888) 41 Ch. D. at pp. 359, 368; *Peek v. Derry*, (1887) 37 Ch. D. at pp. 571, 572. If the statement in its natural sense is untrue and in the special sense in which the defendant used it is not untrue, the defendant will not be liable, if the natural meaning did not occur to him; *Angus v. Clifford*, (1891) 2 Ch. 449.

to mislead. He cannot be heard to say that the plaintiff should have put the other meaning on it.¹ It is for the plaintiff to show the meaning he put on it and its falsity. As regards representation by conduct, it must be active and not merely passive or negative conduct. A vendor of a defective article who actively conceals the defect is guilty of deceit.²

5. Representation by silence.—Mere omission to speak or disclose the truth does not ordinarily amount to a representation. It would however do so in two cases: (a) where a person has made such a partial and fragmentary statement that the non-disclosure of that which is not stated makes that which is stated false³; (b) where a person makes a false statement believing it to be true and though he afterwards comes to know it is false, keeps quiet and allows the person to whom he made it to act on it.⁴ This principle would apply also to a case where the statement was true when he made it but became false afterwards to his knowledge. His duty to disclose the truth later would arise if his original representation amounted to an assertion of its truth at the later point of time, as in a case where a vendor of a medical practice represented that the takings of the practice were 2,000*l.* per annum which had however fallen off before the contract was concluded.⁵ In these cases silence really amounts to a positive misrepresentation. Otherwise it would not be actionable deceit. It may however amount to negligence or a breach of contract; e.g., omission of a vendor of a dangerous article to disclose the danger to the buyer,⁶ or of the occupier of premises to give notice of danger to a guest or invitee.⁷ It may also raise an estoppel by preventing the person owing a duty to speak the truth from afterwards relying on it and seeking relief against the person misled by his silence.⁸

1. *Smith v. Chadwick*, (1831) 20 Ch. D. 27; (1884) 9 A.C. 187, 201; *Aaron's Reefs Ltd. v. Twiss*, (1896) A.C. 273, 282, 283.

2. *Udell v. Atherton*, (1861) 7 H. & N. 172; *Horsfall v. Thomas*, (1862) 1 H. & C. 90; *Schneider v. Heath*, (1813) 3 Camp. 506.

3. *Peck v. Gurney*, (1873) L.R. 6 H.L. 377 at p. 402, per Lord Cairns; see also *Chadwick v. Manning*, (1896) A.C. 211, 238. For a case of a crime consisting in non-disclosure, see *R. v. Kylsant*, (1931) 1 K.B. 442.

4. *Brownlie v. Campbell*, (1880) 5 A.C. at p. 950, per Lord Blackburn; *With v. O'Flanagan*, (1936) Ch. 575, 584, per Lord Wright; see also *Redgrave v. Hurd*, (1881) 20 Ch. D. at p. 13, per Jessel, M.R.; *Mair v. Rio Grande Rubber Estates, Ltd.*, (1913) A.C. at p. 870, per Lord Shaw; *Adamson v. Jarvis*, (1927) 4 Bing. 66, 74, per Best, C.J.; *Reynell v. Sprye*, (1852) 1 De. G. M. & G. 660, 708, 709, per Lord Cranworth.

5. *With v. O'Flanagan*, (1936) Ch. 575, a case of rescission; see also Winfield, *Law of Tort*, p. 408.

6. *Farrani v. Barnes*, (1862) 11 C.B. (N.S.) 553; *Blacker v. Lake*, (1912) 106 L.T. 533, 540.

7. *Indermaur v. Dames*, (1867) L.R. 2 C.P. 311; *Gautret v. Egerton*, (1867) L. R. 2 C.P. 371.

8. *Greenwood v. Martin's Bank*, (1932) 1 K.B. 371 (C.A.); 101 L.J. K.B. 623 (H.L.).

6. **Falsity.**—The representation should be shown to be false, *i.e.*, substantially false, at the time it was acted upon. Where the statement was false when it was made but became true by change of circumstances at the time it was acted upon, there would be no case for relief.¹

7. **Fraud.**—The plaintiff should prove fraud. He may do so by showing either that the defendant knew his representation to be false or that he did not know or believe it to be true. "Merely negligent or unreasonable belief in its truth will not make him liable for deceit. This was settled by the House of Lords in *Derry v. Peek*.² The defendants, directors of a tramway company, issued a prospectus which stated that "one great feature of this undertaking to which considerable importance should be attached is that by the special Act of Parliament obtained, the company has the right to use steam or mechanical motive power instead of horses, and it is fully expected that by means of this a considerable saving will result in the working expenses of the line as compared with other tramways worked by horses." Under the Act, however, the company could not use steam power without the consent of the Board of Trade who subsequently refused the consent, and thereupon the company had to be wound up. The plaintiff sued the directors for damages for loss caused by his taking shares on the faith of their false representation. The House of Lords held that the defendants were not liable as they honestly believed that the consent of the Board of Trade was practically concluded by the passing of the Act of Parliament. Lord Herschell explained the principle as follows³ :—

"I think the authorities establish the following propositions :—First, in order to sustain an action of deceit, there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shewn that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement being fraudulent, there must, I think, always be an honest belief in its truth. And this probably covers the whole ground, for one who knowingly alleges that which is false, has obviously no such honest belief. Thirdly, if fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made."

1. *Ship v. Crosskill*, (1870) L.R. 10 Eq. 73 (a statement in a prospectus that "more than half the shares had been subscribed for," which was untrue at the date of the prospectus but became true before the allotment to the plaintiff); cf. *McConnell v. Wright*, (1903) 1 Ch. 546.

2. (1889) 14 A.C. 337; 37 Ch. D. 541 (C.A.); see also *Reese River Co. v. Smith*, (1869) L.R. 4 H.L. 64, 79, per Lord Cairns; *Evans v. Edmonds*, (1853) 13 C.B. 777, 786, per Maule, J.; see also *Angus v. Clifford*, (1891) 2 Ch. 449; *Le Lievre v. Gould*, (1893) 1 Q.B. 491; *Low v. Bouverie*, (1891) 3 Ch. 82.

3. 14 A.C. at p. 374. See also per Bowen, L.J., in *Angus v. Clifford*, (1891) 2 Ch. at p. 471.

8. **Effect of *Derry v. Peek*.**—This decision provoked considerable controversy at the time.¹ It established two propositions. The first was that an action of deceit is based on fraud, i.e., 'actual' or 'moral' fraud and cannot be extended to cases of honest but careless misrepresentation by calling it 'legal' or 'constructive' fraud.² In this respect the decision was hardly open to any criticism and has been reaffirmed by the House of Lords.³ It was in conformity with the history of the common law action of deceit.⁴ The term 'constructive fraud' was a familiar one in the old courts of equity and was applied to cases of unfair dealing in which they gave the same relief as in cases of actual fraud,⁵ e.g., a purchase by a trustee or solicitor of the property of the beneficiary or client. After the fusion of the courts of common law and equity by the Judicature Act, judges who had experience of equity procedure began to apply similar principles when they were dealing with actions for damages for deceit.⁶ In *Derry v. Peek*, the House of Lords disapproved of this extension of the scope of the tort.⁷ The second proposition for which this case was regarded as authority was that in the absence of fraud a promoter cannot be held liable for negligence and owed no legal duty to take care to make true statements.⁸ But *Derry v. Peek*, was an action for deceit and the judgments were plainly directed to a consideration of the requirements of

1. Sir F. Pollock disapproved of it in strong terms; *Torts*, p. 228; Tagore Law Lectures on Fraud, p. 93; L.Q.R., Vol. V, p. 410; see also Kerr, *Fraud and Mistake*, p. 19; Lindley, *Companies* (Ed. 5) supp. 2; 14 H.L.R. 154; 24 H.L.R. 415. Sir W. Anson was of opinion that the law was correctly applied; L.Q.R., Vol. VI, p. 72; see also *Starkey v. Bank of England*, (1903) A.C. at p. 117, *per* Lord Halsbury.

2. See Lord Bramwell's strictures on this phrase 'legal fraud' in 14 A.C. at p. 346; in *Weir v. Bell*, (1878) 3 Ex. D. at p. 243, he said "I do not understand legal fraud. To my mind it has no more meaning than legal heat or legal cold, legal light or legal shade."

3. *Nocton v. Ashburton*, (1914) A.C. 932, 949; Bowen, L.J., wondered that it should have ever been doubted; *Angus v. Clifford*, (1891) 2 Ch. 449 at p. 470; *Le Lievre v. Gould*, (1893) 1 Q.B. 491 at p. 499.

4. *Angus v. Clifford*, (1891) 2 Ch. at p. 470; see the case of *Chandeler v. Lopus*, 2 Sm. L.C. p. 58.

5. (1914) A.C. at p. 592, *per* Lord Haldane.

6. *Per* Jessel, M.R., in *Redgrave v. Hurd*, (1881) 20 Ch. D. 1 and *Smith v. Chadwick*, (1882) 20 Ch. D. 27 at p. 44; *per* Cotton, L.J., in *Arnison v. Smith*, (1889) 41 Ch. D. 348; *per* Lord Chelmsford, in *Addie v. Western Bank of Scotland*, (1867) 1 H.L. 145 (S.C.) at p. 162; *per* Kekewich, J., in *Glasier v. Rolls*, (1889) 42 Ch. D. 436. The cases of *Burrowes v. Lock*, (1805) 10 Ves. 470, and *Shim v. Croucher*, (1860) 1 De. G. F. & J. 518 where relief was given in respect of an untrue statement said to have been made through forgetfulness are not good law after *Derry v. Peek*, (1889) 14 A.C. 337; see *Low v. Bouvier*, (1891) 3 Ch. 82; the former case may be supported on the ground of estoppel.

7. As to the reasons that influenced the attempted extension, see Pollock, *Fraud*, p. 45; *Arnison v. Smith*, (1889) 41 Ch. D. 368, *per* Lord Halsbury. As proof of actual fraud was often difficult, especially where the defendants were influential directors of companies, the easier course was attempted to get damages on the ground of constructive fraud.

8. *Angus v. Clifford*, (1891) 2 Ch. 449.

that form of action, notwithstanding one or two dicta¹ suggesting the absence of any duty of care in such a case. Therefore the case could hardly be regarded as authority for a proposition of far-reaching importance in the law of negligence. But unfortunately it was so regarded in a case decided by the Court of Appeal and an action for loss due to the gross negligence of promoters in making untrue statements in a prospectus was dismissed, though Bowen, L.J., recognised that a duty of care might well be recognised in such a case.² This was an unsatisfactory state of the law and was altered by the Directors' Liability Act, 1890³ which made a director or promoter of a company liable for loss caused by untrue and misleading statements made without reasonable grounds in a prospectus or report. A similar rule is enacted by the Indian Companies' Act.⁴

9. Extension of the doctrine of Derry v. Peek.—The above doctrine, that negligent misrepresentation by promoters of companies was not actionable, should have received its quietus after its statutory abrogation. On the contrary it was applied by way of analogy to other cases and indeed served as the foundation for a larger rule, *viz.*, that in the absence of contract no duty to take care to make true statements exists under the law.⁵ One exception is where a negligent misrepresentation is likely to cause physical injury to person or property,⁶ *e.g.*, a person who delivers a loaded gun to another carelessly stating it was unloaded, an occupier of dangerous premises carelessly representing them to be safe to an invitee, a police constable giving a wrong street-signal and causing a car collision.⁷ In other cases, the trend of authority in England has been to negative a duty even where the circumstances seem to warrant it. In certain cases this result was due partly also to the influence of another doctrine, *viz.*, that where there is a contract between two persons, a third person cannot complain in tort about damage resulting to him from a breach of that contract. This doctrine had been in force even anterior to *Derry v. Peek* and was overruled only in 1932 in *Donoghue v. Stevenson*.⁸ Thus in *Dickson v. Reuter's Telegram Co.*,⁹ the plaintiff complained that a telegraph company made a careless misdelivery of a telegram to him and he sustained loss by acting on it. His action was dismissed on the ground that the company

1. 14 A. C. at p. 347, *per* Lord Bramwell ; p. 376, *per* Lord Herschell.

2. *Angus v. Clifford*, (1891) 2 Ch. at p. 470.

3. 53 & 54 Vict. c. 64 ; re-enacted by the Companies Consolidation Act, 1908, s. 84. As regards promoters forming a company to which they sell their business, they are held to be in fiduciary relation to the company ; *Erlanger v. New Sambre Phosphate Co.*, (1878) 3 A.C. 1218 ; *Omnium Electric Palaces v. Baines*, (1914) 1 Ch. 332.

4. Act VII of 1913, s. 100.

5. *Low v. Bouverie*, (1891) 3 Ch. 82 ; *Le Lievre v. Gould*, (1893) 1 Q.B. 491.

6. *Dawson v. Bingley, U. D. C.*, (1911) 2 K. B. 149. Restatement, §§ 310, 311.

7. *Brabin v. McCulloch*, (1936) 82 L.J. 96.

8. (1932) A.C. 562 ; below, Chap. XIV, para. 57.

9. (1877) 3 C.P.D. 1.

had a contract only with the sender and not with the receiver in respect of the proper delivery or accurate recording of a telegram. In the United States¹ courts have taken a different view and held telegraph companies liable in similar circumstances. Their view appears preferable to the English cases and has the support of learned opinion in England.² In *Le Lievre v. Gould*,³ decided after *Derry v. Peek*, mortgagees of the interest of a builder under a building agreement advanced money to him from time to time on the faith of certificates given by a surveyor that certain specified stages in the progress of the buildings had been reached. The surveyor was not appointed by the mortgagees and there was no contractual relation between them. In consequence of untrue statements made carelessly by the surveyor in his certificates the mortgagees sustained loss. It was held that they had no right to sue him for negligence as he owed no duty of care to them. In the Court of Appeal, Bowen, L. J., observed that the law might well be the other way and take a more strict view of the defendant's conduct which was grossly negligent and caused damage, but he had to follow the law as it was and not as it might be.

10. Criticism of *Le Lievre v. Gould*.—This decision is still law in England as it has not so far been doubted in any later case.⁴ But certain comments may perhaps be made on it. (a) It was an unnecessary and unjustified extension of the rule in *Derry v. Peek*. (b) It was based on the now exploded theory that a party committing a breach of contract cannot be also sued in tort. (c) If these two grounds of the decision disappear, it contains no reasons⁵ why in a fit case a duty of care to make a true statement should not be inferred. It is submitted that at the present day there is nothing to prevent a court from doing so where circumstances warrant it. This, like other duties in the law of negligence, is subject to the same test, *viz.*, the reasonable man's care. This test would appear to be satisfied in cases where as in *Derry v. Peek*, and *Le Lievre v. Gould*, a person makes a representation of facts within his special province or knowledge, and others could reasonably, and in the common course of

1. 44 Har. L.R. 134.

2. Pollock, Torts, p. 442, etc.; Buckland, 51 L.Q.R. 639.

3. (1893) 1 Q. B. 491. The Court of Appeal overruled *Cann v. Wilson*, (1888) 39 Ch. D. 39, where a firm of valuers who had made a careless and inaccurate report of certain property was held liable to the mortgagee who acted on that report. The decision was open to criticism by its reliance on the opinion of the C. A. in *Peek v. Derry*, reversed later by the H.L., and on the analogy of dangerous chattels, but the conclusion would seem to be sound for the reasons stated in the text.

4. It was followed in *Australian Steam Shipping Co., Ltd. v. Dewitt*, (1918) 33 T.L.R. 178 (issue of certificate by Lloyd's to ship builders does not involve liability to purchaser of ship). See also *Humphrey v. Bowers*, (1929) 45 T.L.R. 297; *Old Gate Estates v. Tophis*, (1939) 3 A. E. R. 209.

5. Except a refutation of the analogy of dangerous chattels invoked in *Cann v. Wilson*, above.

business, be expected to act on it.¹ An action for loss due to a breach of the above duty may however fail on grounds common to other actions of negligence, *e.g.*, want of care of the plaintiff in acting on the representation. The law of negligence has been developed by courts applying the concept of reasonable care to new situations as they arose. But this development has been arrested by the above decisions in the case of negligence in word as distinguished from negligence in act. Just as the duty to be honest which was originally confined to a contractual relationship was dissociated from it by *Pasley v. Freeman*,² the duty to be careful in word awaits a similar dissociation to meet new conditions and needs.

11. Negligent misrepresentation.—While the cause of action in tort for negligence suggested above is precluded by the authorities as they now stand, other modes of redress are available for careless misrepresentation in the following cases: (a) *Fiduciary relationship*, *e.g.*, between trustee and beneficiary, guardian and ward, solicitor and client. In *Nocton v. Ashburton*,³ a solicitor was held liable to make good the loss sustained by his client by reason of a false representation not proved to have been dishonest. The action may be viewed as one for breach of contract but the House of Lords regarded the duty as arising in equity from the fiduciary relationship between the parties. (b) *Duty imposed by statute*, *e.g.*, on a promoter or director of a company in respect of its prospectus. (c) *Duty under contract*.—Negligent misrepresentation may however amount to a breach of contract express or implied.⁴ An implied contract may amount to a warranty. For instance, in *Collen v. Wright*,⁵ it was held that an agent who misrepresents his authority to a stranger is liable to him on the footing of an implied warranty of authority. (d) *Rescission*.—Negligent misrepresentation may also be a ground for avoiding or rescinding a contract or a defence to an action for breach of contract or for specific performance. (e) *Estoppel*.—It may be a ground of estoppel.⁶ For instance, if A told B by mistake that C was entitled to certain property and on the strength of this statement B purchased the property from C, A cannot afterwards be heard to say that he and not C was in fact the owner.

12. Intent to defraud.—The plaintiff should prove that the defendant made the false representation with intent to defraud the plaintiff, *i.e.*,

1. A similar rule has been enforced by some decisions in New York and is proposed in the Draft Restatement, § 628. See also Winfield, *Law of Tort*, p. 415.

2. Above, para. 1.

3. (1914) A. C. 932. Lord Haldane in a famous judgment explained the limits of *Derry v. Peek*.

4. *Baxter v. Gupp & Co.*, (1939) 2 K.B. 271 C.A. (negligence of valuers of property).

5. (1857) 8 E. & B. 647; see also *Pirbank's Executors v. Humphreys*, (1886) 18 Q. B. D. 54; *Starkey v. Bank of England*, (1903) A. C. 114, 115.

6. Indian Evidence Act, s. 115.

intending that the plaintiff should act on it. The intention is presumed if the defendant wilfully used language calculated to induce a normal person in the circumstances of the case to act as the plaintiff did.¹ The mere fact that the plaintiff acted on the defendant's representation will not be proof of deceit. Otherwise "a man might sue his neighbour for having a conspicuous clock too slow, since the plaintiff might be thereby prevented from attending to some duty or acquiring some benefit,"² or "if in a public directory there was the statement of an address of a firm which was inaccurate, any one of the public who had to pay a large sum for a journey to go to that place to do business with that firm would be able to sue the proprietors of the directory for that statement."³ If an intention to deceive is proved, no intention or motive to cause loss is required⁴; in fact even a good or benevolent motive will be no excuse.⁵ The statement may be communicated directly to the plaintiff or indirectly through another. In *Langridge v. Levy*,⁶ the plaintiff's father bought a gun for the use of himself and the plaintiff, and the seller who, with knowledge of that fact, falsely represented it to be safe, was held liable to the plaintiff who was injured by acting on that representation. But if a representation was intended for a person other than the plaintiff to act upon, the plaintiff cannot complain. In *Peek v. Gurney*,⁷ it was held that as the prospectus of a company was intended only to induce the public to apply for allotment of shares, a person who bought shares in the stock market after the allotment could not complain of having been misled by the prospectus. It would be otherwise where the prospectus had a wider object and was part of a scheme to defraud even purchasers of shares in the open market.⁸

13. Damage caused by deception.—The last requirement is actual deception resulting in damage to the plaintiff. He cannot of course complain where his conduct has not been influenced at all by the defendant's

1. *Foster v. Charles*, (1830) 6 Bing. 396.

2. *Per Denman, C.J.*, in *Barley v. Walford*, (1846) 9 Q.B. 197 at p. 208.

3. *Per Denman, J.*, in *Thiodon v. Tindall*, (1891) 65 L.T. 343 at p. 348; see also illustration put by Coleridge, J., in *Gerhard v. Bates*, (1853) 2 E. & B. 476; *Denton v. G. N. Ry. Co.*, (1856) 5 E. & B. 860, where a railway company was held liable for loss sustained by a passenger acting on an erroneous announcement in its time-table is not perhaps good law after *Derry v. Peek*, as there was no fraud.

4. *United Motor Finance Co. v. Addison & Co.*, (1937) 1 M.L.J. 432 (P.C.); 1937 P.C. 21.

5. *Polhill v. Walter*, (1832) 3 B. & Ad. 114, 124; *Peek v. Gurney*, (1873) L.R. 6 H.L. 377 at p. 409, *per Lord Cairns*; *Leddell v. Mc-Dougal*, (1881) 29 W.R. 403; *Armstrong v. Jackson*, (1917) 2 K.B. 822, 827.

6. (1838) 4 M. & W. 337; see this criticised by Lord Esher in *Heaven v. Pender*, (1883) 11 Q.B.D. 503, 511, 512.

7. (1873) L.R. 6 H.L. 377.

8. *Andrews v. Mockford*, (1896) 1 Q.B. 372; as to liability of a director for false report, see *Scott v. Dixon*, (1859) 29 L.J. Ex. 444.

mis-representation.¹ This may be due to several reasons. One reason may be that the misrepresentation was never communicated to him.² Where a person bought a gun without any inspection at all and was thus not influenced by the concealment of a flaw in it by the seller, he was held not entitled to complain of deceit.³ Another reason may be that the plaintiff knew that the defendant's representation was false, and decided to take the risk on himself.⁴ It is for the defendant to prove that fact.⁵ It will not suffice to prove constructive notice by showing that the plaintiff's agent had such knowledge.⁶ The plaintiff may have avoided acting on the defendant's representation and relied wholly on other sources of information.⁷ For instance, a purchaser does not ordinarily trust a vendor's exaggerated statements about the merits of his article but takes care to make his own enquiries.⁸ But it is not necessary that the plaintiff should have relied solely on the defendant's representation.⁹ A court will not speculate on what might have happened if there was no fraudulent representation.¹⁰ It is no defence in an action for fraud that the plaintiff had other means of knowledge or made an incomplete investigation into the facts,¹¹ or that he was told to verify the representation for himself and not rely on its accuracy.¹² Therefore a plea of contributory negligence would not ordinarily be available to the defendant in an action of deceit.

14. Causal relation of damage.—Besides proving deception the plaintiff has to establish that damage followed from it as a natural consequence.¹³ An immaterial or trivial mis-statement is not ordinarily likely

1. *Smith v. Chadwick*, (1882) 20 Ch. D. 27; 9 A.C. 187; *Redgrave v. Hurd*, (1881) 20 Ch. D. 1; *Brownlie v. Campbell*, (1880) 5 A.C. 925.

2. *In re Northumberland and Durham District Banking Co.; Ex parte Bigge*, (1858) 28 L.J. (Ch.) 50.

3. *Horsfull v. Thomas*, (1862) 1 H. & C. 90; dis. from by Cockburn, C.J., in *Smith v. Hughes*, (1871) L.R. 6 Q.B. at p. 605.

4. *Redgrave v. Hurd*, above; *Seddon v. North Eastern Salt Co.*, (1905) 1 Ch. 326.

5. *Redgrave v. Hurd*, (1881) 20 Ch. D. at p. 21.

6. *Wells v. Smith*, (1914) 3 K.B. 722.

7. *Arnison v. Smith*, (1898) 41 Ch. D. at p. 369; see also above, note 5.

8. Below, Chap. X, para. 3 (ii).

9. *Redgrave v. Hurd*, above; *Edgington v. Fitzmaurice*, (1885) 29 Ch. D. 459.

10. *Smith v. Kay*, (1859) 7 H.L.C. 750, 759.

11. *Central Ry. Co. of Venezuela v. Kisch*, (1867) L.R. 2 H.L. 99; *Dobell v. Stevens*, (1825) 3 B. & C. 623; *Dyer v. Hargrave*, (1805) 10 Ves. 505; *Redgrave v. Hurd*, above. See 49 Har. L.R. 830.

12. *Pearson v. Dublin Corporation*, (1907) A.C. 351, 362, 365. It would be otherwise in the case of honest mistakes in the representations; e.g., see *Hemmings v. Sceptre Life Association*, (1905) 1 Ch. 365; *Anstey v. British Natural Premium Life Association*, (1908) 99 L.T. 765 (term in contracts of insurance not to impeach policy for misrepresentation).

13. *Barry v. Croskey*, (1861) 2 J. & H. 1, 22, 23; *Andrews v. Mockford*, (1896) 1 Q.B. 372; *Ajello v. Worsley*, (1898) 1 Ch. 274; *Hyde v. Bulmer*, (1868) 18 L.T. 293.

to influence another's conduct and cause damage. In *Smith v. Chadwick*,¹ it was held that a mis-statement of the valuation of the property of a company to the extent of £3,000 out of £3,01,000 was so trivial that it could not have influenced the plaintiff to take shares in the company. In the following case the causal relation was present but the action failed on grounds of public policy. The plaintiff, a woman, who agreed to live with a married man on his representation that he would get a decree for nullity of marriage of his wife and then marry her could not sue him for deceit when it turned out that he could not get that decree and marry her. As she was a party to an immoral association, she could not complain of it as damage due to deception.²

15. Vicarious liability for deceit.—A person is liable for the fraud of his agent or servant within the scope of his authority though he himself is innocent.³ On this principle a corporation is liable for the fraud of its agents, though a corporation has no mind and is incapable of fraud or malice.⁴ It is not necessary that the agent or servant should have committed the fraud for his master's benefit.⁵ The ingredients of the fraud may consist in the conduct of the principal alone as where he authorises his agent to make a statement which he, but not his agent, knows to be false, or in the conduct of his agent alone, as where the agent acts fraudulently on behalf of an innocent principal. The ingredients may sometimes have to be collected from the conduct of both principal and agent, as where A's agent made innocently and within the scope of his authority a representation to an intending purchaser from A who knew it was false but had not expressly authorised his agent to make it.⁶ The ingredients may be present in the collective conduct of several agents. In *London County, etc., Properties, Ltd. v. Berkeley Property, etc., Co.*,⁷ a corporation which sold house property was made liable for a false representation by one of its servants to the purchasers that the tenants paid their rents punctually and without dispute. The servant was innocent but was misinformed by

1. (1882) 20 Ch. D. 27; (1884, 9 A.C. 187.

2. *Sivyer v. Allison*, (1935) 2 K.B. 403; cf. *Burrows v. Rhodes*, (1899) 1 Q.B. 816. Below, Chap. XIV, para. 76; Chap. XVIII, para. 5

3. *Barwick v. English Joint Stock Bank*, (1867) L.R. 2 Ex. 259; below, Chap. XVI, para. 9.

4. *Mackay v. Commercial Bank of New Brunswick*, (1874) L.R. 5 P.C. 394; *Swire v. Francis*, (1877) 3 A.C. 106; *Banbury v. Bank of Montreal*, (1918) A.C. 626.

5. *Lloyd v. Grace, Smith Co.*, (1912) A.C. 716.

6. *London & County etc., Properties, Ltd. v. Berkeley Property, etc., Ltd.*, (1936) 2 A.E.R. 1039, 1050, per Romer, L.J., disapproving of the contrary decision in *Cornfoot v. Fowke*, (1845) 6 M. & W. 358 (where the agent had said that there was nothing wrong with the house sold without knowing, while his principal knew, that a brothel was next door).

7. Above. Cf. *Anglo-Scottish Sugar Corporation v. Spalding, U.D.C.*, (1937) 2 K.B. 607.

another servant who knew the statement was false. Slessor, L. J., observed: "I cannot see why if the physical acts of several agents may collectively be deemed in law to be the joint responsibility of a principal, the same principle should not apply to states of mind."¹

16. Rule in England about representation as to credit.—In England by the Statute of Frauds² of the reign of Charles II, a guarantee cannot be sued upon as a promise unless it is in writing and signed by the guarantor or his agent. The case of *Pasley v. Freeman*³ was considered to make an inroad on this statutory rule as it allowed an action for deceit for a false representation even though it was only an oral guarantee.⁴ Therefore the Statute of Frauds Amendment Act,⁵ 1828, commonly known as Lord Tenterden's Act, enacted that a representation or assurance made by one person as to the character, credit or trade of another can be used for suing the former, only if it was in writing signed by him. There is no similar enactment in India.

17. Remedy.—The remedy is an action for damages for deceit. Besides, the plaintiff may sue to rescind a contract to which his assent was procured by fraud or resist an action for breach of such contract or for specific performance. The measure of damages is the loss caused by the deceit. For instance where a person was induced by a false prospectus to take shares in a company, the loss is the difference between the money he paid for them and their actual value on the date of allotment,⁶ not their market value which might have been influenced by the very misrepresentation complained of.⁷ If they are worthless, he can recover the whole amount paid.⁸ Similarly where a cattle dealer falsely represented that a cow which he sold to the plaintiff was free from infectious disease, he was held liable for the loss of the plaintiff's cows which were infected by it and died.⁹

1. (1936) 2 A.E.R. at p. 1047.

2. 29 Car. 2, c. 3.

3. (1789) 3 T.R. 51; above, para. 1.

4. *Evans v. Ricknell*, (1801) 6 Ves. 174, 182, 186, *per* Lord Eldon.

5. (1828) 9 Geo. 4, c. 14, s. 6; as to this see *Banbury v. Bank of Montreal*, (1918) A.C. 626.

6. *Peck v. Derry*, (1887) 37 Ch. D. 541, 591; *McConnell v. Wright*, (1903) 1 Ch. 546, 554 (as to difference between damages in tort and breach of contract). See *Baxter v. Gapp & Co.* (1939) 2 K.B. 271 C.A.

7. *Broome v. Speak*, (1903) 1 Ch. 586 at p. 606

8. *Twycross v. Grant*, (1877) 2 C.P.D. 469.

9. *Mullett v. Mason*, (1866) L.R. 1 C.P. 559.

CHAPTER X.

INJURIOUS FALSEHOOD.

1. **Injurious falsehood.**—The name 'injurious falsehood' is used as a convenient title for wrongs which consist in causing damage to a person by making false statements or representations to others, while deceit consists in causing damage by making a representation to the party suffering the damage. These wrongs are: (a) slander of title or of goods, (b) passing off goods, (c) imitation of the name of another's business.

2. **Slander of title or of goods.**—The phrase 'slander of title' was formerly used to refer to disparagement of a person's title to real property,¹ but is nowadays a generic name for disparagement of property movable or immovable, corporeal or incorporeal.² The disparagement need not necessarily relate to title but may be of any description, e.g., a false statement that a person's house which he was proposing to sell was haunted.³ The phrase 'slander of goods' is used when the disparagement relates to goods or merchandise. The disparagement may be by depreciating the quality or pointing out some other defect, e.g., a false statement alleging A's goods to be an infringement of B's trade mark and warning A's customers not to buy them.⁴ The leading case of *Ratcliffe v. Evans*⁵ is an

1. *Brook v. Rice*, (1949) 4 Ex. 521, *Ravenhill v. Upcott*, (1869) 20 L.T. 233. For older cases, see Odgers, *Libel and Slander*, p. 70; cases are now rare.

2. *Malachy v. Soper*, (1839) 3 Bing. N. C. 371 (plaintiff's shares in a silver-mining company); *Gutsole v. Mathers*, (1836) 1 M. & W. 495 (that the plaintiff's tulips were stolen articles and he had no title to them); *Green v. Button*, (1835) 2 C.M. & R. 707 (defendant falsely asserting a lien on the plaintiff's goods); *Evans v. Harlow*, (1844) 5 Q.B. 624 (that the plaintiff had no patent for his self-acting syphons); *Marsh v. Billings*, (1851) 7 Cush. 322 (defendants, coach-owners, induced customers to believe that they were authorised by a hotel to drive guests from a railway station to the hotel while the plaintiffs were the coach-owners really authorised); *Hatchard v. Mege*, (1887) 18 Q.B.D. 771 (the plaintiff's wine not of the brand that it was represented to be, unless it bore the defendant's label); *Dunlop Pneumatic Tyre Co. v. Maison Talbot*, (1904) 20 T.L.R. 579 (the plaintiff's right to import Michelin tyre denied); *Alcott v. Millar's Karri and Jarrah Forests*, (1904) 91 L.T. 722 (plaintiff's timber and its usefulness for street-paving purposes decried); *Lynne v. Nicholls*, (1906) 23 T.L.R. 86 (false statements as to circulation of the plaintiff's newspaper by the defendant's newspaper); *British Railway Traffic & Electric Co. v. C.R.C. Co.*, (1922) 2 K.B. 260 (the defendants being described as owners of the plaintiff's motor lorries).

3. *Barrett v. Associated Newspapers*, (1907) 23 T.L.R. 666; see also *Casey v. Arnott*, (1876) 2 C.P.D. 24 (that the plaintiff's ship was unseaworthy); *Hargovind v. Kikabhai*, I.L.R. 1938 Nag. 348; 1938 Nag. 84.

4. *Wren v. Weild*, (1869) L.R. 4 Q.B. 730; *Rollins v. Hinks*, (1872) L.R. 13 Eq. 355; *Dicks v. Brooks*, (1880) 15 Ch. D. 22; *Burnett v. Tak*, (1882) 45 L.T. 743; *Anderson v. Liebig's Extract of Meat Co.*, (1882) 45 L.T. 757; *Skinner & Co. v. Shew & Co.*, (1893) 1 Ch. 413; *Royal Baking Powder Co. v. Wright, Crossley & Co.*, (1900) 18 R.P.C. 95; *Nemichand v. Wallace*, (1907) I.L.R. 34 Cal. 495.

5. (1892) 2 Q.B. 524; above, Chap. VII, para, 89.

instance of a false representation about business. The defendant was held liable for publishing in his newspaper a false statement that the plaintiff had ceased to carry on his business and that his firm did not then exist, and thereby causing loss of custom to the plaintiff.

3. **Points to be proved in an action for slander of title or of goods.**—The essential ingredients in the action are damage ¹ and malice.² The plaintiff must prove the following points ³ :

(i) **Publication of a false statement.**—That the defendant published a false statement or representation. It is for the plaintiff to prove the falsehood or untruth of the statement while in the case of a defamatory statement the law presumes it to be false until the contrary is proved.⁴ The statement may be oral or written and courts in England do not make any such distinction as between slander and libel.

(ii) **Disparagement.**—That the said publication disparaged the plaintiff's property or business. If it disparaged also his reputation directly or indirectly, then an action for defamation will also lie. The principles applicable to the interpretation of alleged defamatory statements apply here also.⁵ A person is entitled to 'puff' his own goods, *e.g.*, by saying that his goods are the best in the market or even that they are superior to the plaintiff's. No action lies for such statements as a purchaser does not usually rely on them to the exclusion of his own judgment.⁶ Besides, if an action were allowed, it would enable traders to use it as a means of advertisement. In *White v. Mellin*,⁷ the defendant, a chemist, was held not liable for a statement contained in wrappers affixed by him to the plaintiff's bottles of Mellin's Food, which the defendant sold in his premises, that the public were recommended to buy the defendant's (Dr. Vance's) food for infants and invalids and that "it was more healthful and nutritious than any preparation yet offered." But if the defendant makes any untrue statement of fact about the plaintiff's goods, it is another matter.⁸

1. *Malachy v. Soper*, (1836) 3 Bing N.C. 371.

2. *Pater v. Baker*, (1847) 3 C.B. at p. 844; *Halsey v. Brotherhood*, (1880) 15 Ch. D. 514; 19 Ch. D. 386.

3. *Royal Baking Powder Co. v. Wright, Crossley & Co.*, (1900) 18 R.P.C. 95, 104; see also *Malachy v. Soper*, (1836) 3 Bing N.C. at p. 386; *Nemichand v. Wallace*, above; *Imperial Tobacco Co. v. Bonnan*, 1928 Cal. 1.

4. *Pater v. Baker*, (1847) 3 C.B. at p. 868; *Burnett v. Tak*, (1882) 45 L.T. 743.

5. *Griffiths v. Benn*, (1911) 27 T.L.R. 346; *Cundey v. Lerwill & Pike*, (1908) 24 T.L.R. 584; *Leatham v. Rank*, (1912) 57 Sol. Jour. 111.

6. Below, Chap. XIV, para. 54.

7. (1895) A.C. 154; see also *Hubbuck v. Wilkinson*, (1899) 1 Q.B. 86; cf. *Lyne v. Nicholls*, (1906) 23 T.L.R. 86.

8. *Young v. Macrae*, (1862) 3 B. & S. 264.

(iii) **Damage.**—That the said publication caused special damage as a natural consequence,¹ e.g., loss of business, customers, a bargain, property, income or profits, or costs incurred by being compelled to defend his title.

(iv) **Malice.**—That the statement was published maliciously,² i.e., out of some motive other than a *bona fide* claim of right.³ Absence of belief in the truth of the statement will be conclusive evidence of malice, but a merely careless publication of it is not by itself enough.

4. **Remedy for slander of title or of goods.**—The remedy is an action for damages or an injunction or both.⁴ The measure of damages would be the pecuniary equivalent of the loss sustained as a natural consequence of the disparagement. The amount may also vary according to aggravating or mitigating circumstances in the case. The relief by way of injunction is a necessary and appropriate one for preventing future injury to business. In an action for an injunction the plaintiff need not prove that damage has actually been sustained, but it is enough if he shows that damage must or will necessarily result.⁵

5. **Passing off goods.**—The action for passing off goods is the remedy for a false representation tending to deceive purchasers into believing that the goods which the defendant is selling are really the plaintiff's.⁶ The representation may be by a direct statement to that effect,⁷ or as is more usually the case, by conduct by way of using the distinctive mark, name, number,⁸ design, get-up or appearance of another's goods. In an action for passing off, the plaintiff need not prove either an intent to

1. *Ratcliffe v. Evans*, (1892) 2 Q.B. at p. 530; above, Chap. VII, para. 89; see also *Haddon v. Lott*, (1854) 15 C.B. 411; *Barrett v. Associated Newspapers*, (1907) 23 T.L.R. 666; *Leatham v. Rank*, (1912) 57 Sol. J. 111; *Ajello v. Worsley*, (1898) 1 Ch. 274; where the statement is partly *bona fide* and partly *mala fide*, the damage must be shown to result from the latter part; *per Parke, B.*, in *Brook v. Rowel*, (1849) 19 L.J., Ex. at p. 115.

2. As to confusion in this context due to the use of the term 'malice in law,' see *per Scrutton, L.J.*, in *Shapiro v. La Motta*, (1923) 40 T.L.R. at p. 203.

3. On this subject, see *Wren v. Weild*, (1869) L.R. 4 Q.B. 730; *White v. Mellin*, (1895) A.C. 154; *Halsey v. Brotherhood*, (1881) 19 Ch. D. 386; *Dunlop Pneumatic Tyre Co., Ltd. v. Maison Talbot and others*, (1904) 20 T.L.R. 579; *Balden v. Shorter*, (1933) Ch. 427; *Imperial Tobacco Co. v. Bonman*, 1928 Cal. 1; as to the sense of duty of an agent or attorney, see *Hargrave v. Le Breton*, (1769) 4 Bur. 2423; *Watson v. Reynolds*, (1826) M. & M. 1 (attorney); *Steward v. Young*, (1870) L. R. 5 C. P. 122 (agent); *Pitt v. Donovan*, (1813) 1 M. & S. 639 (near relation and privy in estate).

4. It survives to legal representatives unlike the action for defamation; *Hatchard v. Mege*, (1887) 18 Q.B.D. 771.

5. *White v. Mellin*, above; *British Ry. Traffic & Electric Co. v. C.R.C. Co.*, above.

6. *Per James, L.J.*, in *Singer Machine Manufacturers v. Wilson*, (1876) 2 Ch. D. 434, 451; in appeal (1877) 3 A. C. 376; *Singer Manufacturing Co. v. Loog*, (1880) 18 Ch. D. at p. 412; in appeal (1882) 8 A.C. 15. As to history of this action, see *Kerly, Trade Marks*, p. 2; *Holdsworth*, Vol. VIII, p. 430. The action was developed during the 19th century.

7. *Ainsworth v. Walsley*, (1866) L.R. 1 Eq. 518.

8. *Guzarat G. & M. Co. v. Swadeshi Mills Co.*, 1939 Bom. 118.

deceive¹ or actual damage.² It is enough if he shows that the conduct of the defendant was calculated or likely to deceive or mislead the public,³ i.e., the unwary or incautious and not the careful or intelligent purchaser.⁴ On proof of this fact the plaintiff is entitled to an injunction, and even to nominal damages though deception and damage have not actually resulted.⁵ Originally the common law courts insisted on proof of fraud,⁶ but courts of equity intervened by granting injunctions even in cases where the imitation of a trade mark was made in ignorance, provided such imitation was likely to deceive or mislead the public.⁷ The doctrine of the equity courts was accepted as part of the common law after the amalgamation of the two sets of courts by the Judicature Act.⁸ Its effect was that a trade name or mark came to be considered as a kind of property.⁹ In England the Trade Marks Acts¹⁰ have completed this process by providing for registration of trade marks by their owners. On registration the owner of a trade mark¹¹ is entitled to its exclusive use and can sue for infringement on the strength of the certificate of registration.¹² In India

1. *Singer Machine Manufacturers v. Wilson*, (1877) 3 A.C. 376, 391, per Lord Cairns; *Johnston v. Orr-Ewing*, (1882) 7 A.C. 219; *Cellular Clothing Co. v. Maxton*, (1899) A.C. 326; *Spalding v. Gamage* (1915) 84 L.J. Ch. 449; *Draper v. Trist*, (1939) 3 A.E.R. 513 C.A.

2. *Blofield v. Payne*, (1833) 4 B. & Ad. 410; *Jay v. Ladler*, (1888) 40 Ch. D. at p. 456; *Johnston v. Orr-Ewing*, above; *Draper v. Trist*, above.

3. See cases in note 1 above.

4. *Singer Manufacturing Co. v. Loog*, (1882) 8 A.C. 15 at p. 18.

5. *Draper v. Trist*, (1939) 3 A. E. R. 513 C. A. See also *Reddaway v. Bentham Hemp Spinning Co.*, (1892) 2 Q.B. 639, 644; *Spalding v. Gamage*, (1915) 84 L.J. Ch. 449; *Hajee Jumal & Co. v. Abdul Kuzem & Co.*, (1933) I.L.R. 57 Mad. 600; cf. *Malayan Tobacco Distributors, Ltd. v. The United Kingdom Tobacco*, 1933 P.C. 138.

6. *Crawshay v. Thompson*, (1842) 4 M. & G. 357.

7. *Millington v. Fox*, (1838) 3 My. & Cr. 338.

8. See cases in note 1 above. It is interesting to note that a similar process of extension of the remedy for fraud to cases of careless misrepresentation was arrested by *Derry v. Peek*, above, Chap. IX, para. 8. As to distinction between an action of deceit and a passing off action, see *Bourne v. Swan & Edgar, Ltd.*, (1903) 1 Ch. 211, 216, 227, per Farwell, J.

9. *Singer Machine Manufacturers v. Wilson*, (1876) 2 Ch. D. 434, 441, 442, per Jessel, M.R.; p. 451, per James, L.J.; p. 454, per Mellish, L.J.; *Warwick Tyre Co. v. New Motor and General Rubber Co.*, (1910) 1 Ch. 248, 255, per Neville, J.; see also per Lord Westbury in *Edelsten v. Edelsten*, (1863) 1 De. G. J. & S. 185, 199; *Powell v. Birmingham Vinegar Brewery Co.*, (1894) 3 Ch. 449; (1897) A.C. 710; *Walsing v. Jivandus & Co.*, (1924) I.L.R. 50 Bom. 402.

10. The first statute was of 1875 (38 & 39 Vict., c. 91). The one now in force is that of 1905 (5 Ed. 7, c. 15) amended up to 1919.

11. S. 2. It includes a device, brand, heading, label, ticket, name, signature, word, letter, numeral or any combination thereof.

12. Ss. 39 to 41. The remedy under the statute is concurrent with the common law action; s. 45. As to the difference between the two actions, see Kerly, Trade Marks, pp. 436, 460; Clerk & Lindsell, Torts, pp. 787, 788.

similar rules have been enacted by the Trade-Marks Act, 1940.¹ While the English and Indian Acts allow actions for infringement of registered trade-marks, they do not preclude the common law remedy of the action for passing off goods.²

6. **Points to be proved in an action for passing off goods.**—The plaintiff must prove that his goods were known to the public by some distinctive name, mark, get-up, appearance, or badge, and that the defendant's use or imitation of the name, mark, etc., was likely to mislead the public into believing that the defendant's goods were the plaintiff's.³ The defendant's use or imitation can obviously have no such effect when he uses the mark for a different class of goods from the plaintiff's, *e.g.*, the plaintiff using it for cigarettes and the defendant for hats or soaps.⁴ Where the imitation is of some well known device, design, or get-up, chosen by the plaintiff, it would ordinarily be fraudulent and deceptive. Where names or words are chosen to refer to an article, the position is less simple. If the name or word is peculiar and uncommon and arbitrarily chosen by the plaintiff for his goods, he can easily establish that the imitation of it by another was fraudulent.⁵ But it is a different matter if the words are ordinary or descriptive.⁶ Every person has a right to the use of the English or any other language and one trader cannot complain of the use of a name by another unless it has acquired a distinctive application to the plaintiff's goods. For instance, it was held that the word 'naptha' was descriptive of the article and could not be monopolised by one trader.⁷ A brewer who had been in the habit of putting on his bottles a label with the words "nourishing stout" could not restrain another brewer from

1. V of 1940. For cases before the Act, see *The British American Tobacco Co. v. Mahboob Buksh*, (1910) I.L.R. 38 Cal. 110, 117; *Imperial Tobacco Co. v. Bannan*, (1924) I.L.R. 51 Cal. 892 (P.C.); *Hafez Jamal, etc., Co. v. Abdul Kareem Co.*, (1933) I.L.R. 57 Mad. 600; *Anglo-Indian Drug & Chemical Co. v. Swastik Oil Mills Co.*, (1934) I.L.R. 59 Bom. 373.

2. 5 Ed. 7, c. 15, and 45; Act V of 1940, s. 20 (2).

3. Per Lord Herschell in *Leahy, Kelly and Leahy v. Glover*, called also as the Two D case, (1893) 10 R. P. C. at p. 155 (H.L.); Kerly on Trade Marks, p. 583. It does not matter how long the plaintiff's trade mark was known if it was long enough in the market to be known; *Somerville v. Schembri*, (1887) 12 A.C. 453; *Badische Aniline Co. v. Teppall*, (1903) 5 Bom. L.R. 1025. The plaintiff cannot ask a witness as to whether the public will be misled or deceived but the judge must decide it for himself; *Bourne v. Swan and Edgar, Ltd.*, (1903) 1 Ch. 211, 224.

4. *Thomas Bear & Sons v. Prayag*, I.L.R. 1940 All. 446; 1940 P.C. 86.

5. *Ford v. Foster*, (1872) L.R. 7 Ch. 611 ('Eureka' for shirts); *Upendra Nath v. The Union Drug Co.*, 1926 Cal. 837 ('Urea Stibamine' for a drug); *Unani Dawakhana v. Hamdard*, 1930 Lah. 999.

6. Cf. S. 44 of the Trade Marks Act of 1905.

7. *Fels v. Hedley*, (1930) 20 T.L.R. 69; such would be the case of a new name of a patented article after the patent had expired, *e.g.*, *Linoleum Manufacturing Co. v. Nairn*, (1878) 7 Ch. D. 834; *Canadian Shredded Wheat Co., Ltd. v. Kellogg Co. of Canada Ltd.*, 1938 P. C. 143.

using these words on his labels.¹ But even a descriptive name may acquire a special and exclusive application to a person's goods. In that case he has a right to restrain another's use of it. In *Reddaway v. Banham*,² the words 'camel hair belting' were held to have acquired a special application to the plaintiff's goods of that description, and the defendant was restrained from using those words for his article. It is not merely an exact but even a colourable imitation of a mark or name that will be restrained if it has a tendency to mislead the public.³ A name which had a special and secondary sense with reference to a person's goods may cease to have it and become one of general application or *publici juris*, by being employed by others, e.g., "Harvey's sauce," "Liebig's extract of meat."⁴ If however it is ambiguous whether a name is a distinctive or general one, it is the duty of a person adopting it to take care that he does not mislead. For instance the name 'Corona' was used by the plaintiffs for a long time as distinctive of a brand of cigar. But the name was also used by manufacturers to denote a certain size of cigar. It was held that the name being ambiguous, the defendant should be restrained from selling a cigar of any other brand as 'Corona' unless it was made clear to the customer that it was not the 'Corona' brand.⁵ Whether the plaintiff has established a reputation for the name, mark, etc., of his goods, and whether the defendant's mark, name, etc., is so similar as to mislead purchasers would depend on all the circumstances of the case.⁶ If an intent to defraud is shown, it would of

1. *Ragget v. Findlater*, (1873) L. R. 17 Eq. 29; cf. *Cellular Clothing Co. v. Maxton*, (1899) A. C. 326; *Grand Hotel Co. v. Wilson*, (1904) A. C. 103. See *Cola-Cola Co. of Canada Ltd. v. Pepsi-Cola Co. of Canada Ltd.*, (1942) 1 A.E.R. 615 P.C.

2. (1896) A. C. 199; see also *Montgomery v. Thompson*, (1891) A. C. 217 ('Stone Ale'); *Wotherspoon v. Currie*, (1872) L. R. 5 H. L. 508 ('Glenfield Starch'); *Professor Jaeger v. Jaeger Co.*, (1927) 43 T. L. R. 220 ('Jaeger'); *Reddaway v. Hartley*, (1931) 47 T. L. R. 266 (Lechat's camel-hair belting); *Sugar Mills Ltd. v. Tata Oil Mills Co.*, (1943) 45 P. L. R. 195.

3. E.g., *Iron-Ox Remedy Co. v. Co-operative Wholesale Society*, (1907) 24 R. P. C. 425; the plaintiff selling a medicine known as "Iron-Oxide tablets".

4. *Lazenby v. White*, (1871) 41 L. J. Ch. 354-n; *Liebig's Extract of Meat Co. v. Hambury*, (1867) 17 L. T. N. S. 298; *Watling v. Jivandis & Co.*, (1924) 1 L. R. 50 Bom. 402.

5. *Havana Cigar and Tobacco Factories, Ltd. v. Oddenino*, (1924) 1 Ch. 179. Cf. *Jaques v. Chess*, (1940) 2 A. E. R. 285 C. A.

6. For instances in India, see: Cal.—*Saikh v. Gindram*, (1897) 1 L. R. 24 Cal. 364; *Nagendra Nath v. R.*, 1930 Cal. 274; 34 C.W.N. 274.

Bom.—*Heniger v. Drex*, (1900) 1 L. R. 28 Bom. 435; *Anglo-Indian Drug & Chemicals Co. v. Swastik Oil Mills, Ltd.*, (1934) 1 L. R. 55 Bom. 373.

Mad.—*Venkatashalam v. Rajagopal*, (1932) 1 L. R. 55 Mad. 966; 63 M.L.J. 568; *Batchayi v. Ramaswami*, 1935 Mad. 3 (proved that the mark is associated with plaintiff in public mind necessary).

All.—*Chatatpal Sharma v. Jaganmoh Das*, (1932) 1 L. R. 44 All. 608; 21 A.L.J. 551; *Juggi Lal Kamalpet v. Swastik Mills Co.*, (1938) 1 L. R. 31 All. 182 (P.C.); 56 I.A. 1.

Lah.—*Unani Dawakhana v. Munir*, 1930 Lah. 990; *Banarsi Das v. R.*, (1928) 1 L. R. 9 Lah. 491.

course go a great way to prove probability of deception.¹ A manufacturer of goods as well as their importer or vendor can acquire a right to an exclusive name, mark, etc.² A person who has himself pirated another's trade mark cannot complain of an infringement of it.³ The above principles apply to the names or titles of books, periodicals, newspapers, etc.⁴ An author can restrain the publication in his name of a book not written by him.⁵ Foreign trade marks and trade names are protected in the courts of this country by reason of an International Convention for protection of industrial property.⁶ In a Bombay case⁷ the High Court allowed an action filed by *pujaries* or priests of a village temple for an injunction to prevent the defendants from installing an idol with the same name in another temple. This action bears no analogy to a passing off action but could be regarded as one for a disturbance of the plaintiffs' enjoyment of their religious office and its emoluments. On this ground this case falls outside the principle of free competition recognised in the old case of the Gloucester Grammar School-master⁸.

7. Imitation of the name of another's business.—On principles similar to those of an action for passing off, an action will lie against a person for imitation of the name of another's business if it is likely to mislead the public.⁹ When a person uses his own name *simpliciter* for his business, there can be no right of action against him unless an intent to mislead is also present.¹⁰ If however he uses an added or abbreviated form

1. *Swedish Match Co. v. Adamjee*, (1928) I.L.R. 6 Rang. 221; *Muniswami v. Rajagopala*, (1928) 54 M.L.J. 644; 1928 Mad. 7; see s. 3 of the Trade Marks Act of 1905.

2. *Imperial Tobacco Co. v. Honnan*, (1924) I.L.R. 51 Cal. 892 P.C.; 51 I.A. 269; see also *West End Watch Co. v. Berna Watch Co.*, (1910) I.L.R. 35 Bom. 425; *Meera Sahib v. Abdul Azees*, I.L.R. (1938) Mad. 466.

3. *The Leather Cloth Co. v. American Leather Cloth Co.*, (1863) 4 De. G. J. & S. 137; *The Leather Cloth Co. v. Lonsant*, (1869) L.R. 9 Eq. at p. 352; *Ford v. Foster*, (1872) L.R. 7 Ch. at p. 631; *Sen v. Oakes*, (1919) 24 C.W.N. 155. As to the use of the word 'patent' for unpatented articles of plaintiff, see *Marshall v. Ross*, (1869) L.R. 8 Eq. 651; *Lee v. Haley*, (1869) L.R. 5 Ch. 155; *Cochrane v. Macnish*, (1896) A.C. 225.

4. *Schove v. Schmincke*, (1886) 33 Ch. D. 546; *Borthwick v. The Evening Post*, (1888) 37 Ch. D. 449; *Walter v. Emmot*, (1885) 54 L.J. Ch. 1059; *Licensed Victuallers' Newspaper Co. v. Bingham*, (1888) 38 Ch. D. 139; *Henry Blacklock Co. v. Bradshaw's Publishing Co.*, (1926) 43 R.P.C. 97; *Muniswami v. Rajagopala*, (1928) 54 M.L.J. 644.

5. *Lord Byron v. Johnston*, (1816) 2 Mer. 29; *Barnard v. Pillow*, (1868) W.N. 94; *Martin v. Wright*, (1833) 6 Sim. 297.

6. The International Convention as revised at Washington, 1911; see Kerly, *Trade Marks*, p. 812; *Wulfsing v. Jivandas & Co.*, (1924) I.L.R. 52 Bom. 402.

7. *Purshottamdas v. Bai Dahi*, I.L.R. 1940 Bom. 339; 1940 Bom. 205.

8. Above, Chap. I, para. 27; below, Chap. XI, para. 24.

9. *Leather Cloth Co. v. American Leather Cloth Co.*, (1865) 11 H.L.C. 523; *Hormus Ardeskar v. Ardeskar Cowasji*, (1934) I.L.R. 61 Cal. 571.

10. *Rodgers (Joseph) & Sons v. Rodgers, (W.N.) & Co.*, (1924) 41 R.P.C. 277, *per* Romer, J.; see also *Burgess v. Burgess*, (1853) 3 De G. M. & G. 896; *Turton v. Turton*, (1889) 42 Ch. D. 128; *Kingston Miller & Co. v. Thomas Kingston & Co.*, (1912) 1 Ch. 575; *Jameson & Co. v. Jameson*, (1898) 15 R.P.C. 169; *Jay's Ltd. v. Jacobi*, (1933) Ch. 411; *Harris, Ltd. v. Harris*, (1933) 50 T.L.R. 123.

of his name he will be restrained on proof of probability of deception. For instance a company called 'Short's Ltd.,' obtained an injunction against the defendant, Ernest Lewis Short, starting a new firm under the name of 'Short's.'¹ The Indian Companies Act² enacts that a company cannot be registered in a name identical with another's or so closely resembling it as to be calculated to deceive. The National Bank of India got an injunction against a new bank started under the name of "the National Bank of Indore."³

8. Use of another's name without injury to his trade or business.—There is no right to sue when the use of the name of the plaintiff or his property does not injure his trade or business.⁴ An action to restrain the defendant from using a name for his villa similar to that of the plaintiff's was dismissed, though such use might cause inconvenience to the plaintiff.⁵ Similarly a person who was using the words "Street London" as his telegraphic address failed to get an injunction to prevent a bank using the same words.⁶ The use of a person's name by another may be defamatory as where the name of a doctor of repute is used without his authority to puff some quack medicine.⁷

9. Remedy for 'passing off.'—The civil remedy is an action for passing off. Besides, a criminal prosecution is also available for the offence of using a false trade mark or property mark,⁸ but not if the person using the mark had no intent to defraud.⁹ In the action for passing off, the plaintiff can ask for (a) damages, (b) injunction, (c) other appropriate relief like delivering up of the counterfeited articles. Damages represent the

1. *Short's Ltd v. Short*, (1914) 31 R.P.C. 294; cf. *Van Oppen & Co. Ltd. v. Van Oppen*, (1903) 20 R.P.C. 617; *Rodgers (Joseph) & Sons v. Rodgers (W. N.) & Co.*, (1924) 41 R.P.C. 277; *William v. Goffredo*, 1931 P.C. 15.

2. Act VII of 1913, s. 11 (1), in England the Companies (Consolidation) Act, 1908, s. 8 (1); see *Tussaud v. Tussaud*, (1890) 44 Ch. D. 678, *North Cheshire and Manchester Brewery Co. v. Manchester Brewery Co.*, (1899) A.C. 83, *Valentine Meat Juice Co. v. Valentine Extract Co.*, (1900) 83 L.T. 259; *Fine Cotton Spinners' Association v. Harwood Cash & Co., Ltd.*, (1907) 2 Ch. 184, *Dorman & Co. v. Henry Meadows, Ltd.*, (1922) 2 Ch. 232; *Society of Motor Manufacturers and Traders v. Motor Manufacturers Insurance Co.*, (1925) 1 Ch. 675.

3. *National Bank of India v. National Bank of Indore*, (1922) 24 Bom. L.R. 1181; *A. G. S. L. Assurance Co. v. N. A. Insurance Co.*, 1939 Mad. 555.

4. *Du Boulay v. Du Boulay*, (1869) L.R. 2 P.C. 430, 441, per Lord Chelmsford.

5. *Day v. Brownrigg*, (1878) 10 Ch. D. 294.

6. *Street v. Union Bank of Spain*, (1885) 30 Ch. D. 156.

7. *Dockrell v. Dougall*, (1899) 80 L.T. 556, where however the libel was found against; see also *Tolley v. Fry and Sons*, (1931) A.C. 333; above, Chap. VII, para. 20.

8. Ss. 478 to 489, I.P.C.; the Indian Merchandise Marks Act (IV of 1889). For instances, see *Mohammad Raza v. E.*, 1930 Oudh 360; *Banarsi Das v. E.*, (1928) I.L.R. 9 Lah. 49.

9. I.P.C., ss. 482-486. The goods are liable to forfeiture, s. 9 of Act IV of 1889.

actual loss sustained by the plaintiff, *e.g.*, fall in business and income,¹ loss by reason of his being compelled to lower his prices to avoid being driven from the market,² damage to his trade reputation by reason of the spurious goods being inferior to the genuine ones.³ He may elect between damages and an account of the profits obtained by the defendant after the commencement of the wrong.⁴ But neither damages nor profits are available against an innocent defendant who was not aware of the rights of the plaintiff in the particular name or mark at the time of infringement.⁵ But an injunction is available against him.⁶ There can be no claim for penal or exemplary damages.⁷ The plaintiff is not bound to wait till the infringement of a trade mark is repeated or till he gives warning and it is disregarded, because, "the life of a trade mark depends upon the promptitude with which it is vindicated."⁸ The court has also power to grant other appropriate relief. If the defendant is found to have spurious articles marked with the false mark in his possession, he can be ordered to remove the marks or deliver up the articles.⁹

10. Other forms of injurious falsehood.—Apart from the above species of injurious falsehood, an action would lie for intentionally causing damage to a person making any false statement or representation to another.¹⁰ For instance, in an early case,¹¹ damages were awarded for a false statement made by the defendant to a person to whom the plaintiff was engaged to be married, that the plaintiff was a married woman and his own wife, with the result that the plaintiff lost the marriage. In another case,¹² the plaintiff recovered damages for loss of business due to the defendant publishing a false statement that the plaintiff's wife who was assisting him in his shop was guilty of adultery. Similarly an action would lie for

1. *Juggi Lal-Kamalpet v. The Swadeshi Mills Co.*, (1928) I.L.R. 51 All. 182 P.C.; *Hormus Ardeskar v. Ardeskar Cowasji*, (1934) I.L.R. 61 Cal. 571.

2. *Alexander v. Henry*, (1895) 12 R.P.C. 360.

3. *Spalding v. Gamage*, (1915) 84 L.J. Ch. 449.

4. *Edelsten v. Edelsten*, (1863) 1 De G.J. & S. 185; *Slazenger v. Spalding*, (1910) 1 Ch. 257. As to the nature of the account, see *Lever v. Goodwin*, (1887) 36 Ch. D. 1; *Weingarten v. Bayer*, (1905) 92 L.T. 511.

5. *Slazenger v. Spalding*, above; nominal damages may however be awarded; above, p. 351.

6. As to the form of injunction in particular cases, see *Johnston v. Orr-Ewing*, (1882) 7 A.C. 219; 13 Ch. D. 434; *Slazenger v. Feltham*, (1889) 6 R.P.C. 531.

7. *Upper Sind Cigarettes Manufacturing Co. v. Peninsular Tobacco*, 1941 Lah. 293.

8. *Per James, L.J.* in 13 Ch. D. at p. 464.

9. *Slazenger v. Feltham*, (1889) 6 R.P.C. 531; as to rights of innocent bailees, like the lien of a wharfinger over such goods, see *Upmann v. Elkan*, (1871) L.R. 12 Eq. 140; 7 Ch. 130; *Moet v. Pickering*, (1877) 8 Ch. D. 372.

10. *Ratcliff v. Evans*, (1892) 2 Q.B. 524.

11. *Shepherd v. Wakeman*, (1661) 1 Sid. 79. See also *Dixon v. Holden*, (1869) L.R. 7 Eq. 488 (a statement that the plaintiff was a partner in a bankrupt firm.)

12. *Riding v. Smith*, (1876) 1 Ex. D. 91.

loss due to a false statement that one of the assistants in the plaintiff's shop had a contagious disease.¹ These statements though not defamatory of the plaintiff are actionable under the category of injurious falsehood. In fact even a laudatory statement may be maliciously designed to cause and may cause damage. If *A* falsely and maliciously tells *B*, a rich relation of *C* and a man of penurious disposition, that *C* did some generous act or was generous with his money, and thereby causes *C* to fall in *B*'s estimation and lose a legacy or other benefaction, *A* would be liable to *C*.² But no action will lie if there is no malice. Where the plaintiff, a professional pianist, sued the proprietors of a music hall for making an erroneous announcement that she was appearing in the hall during a certain week, whereby she lost engagements elsewhere, it was held that the defendants made a *bona fide* mistake and were not liable.³

1. *Per* Lord Kincairney in *Bruce v. J. M. Smith, Ltd.*, (1898) 1 F. at p. 330 (Ct. of Sess.); Gatley, Libel and Slander, p. 151.

2. This opinion was advanced by Sir John Campbell in his argument in *Kelly v. Partington*, (1833) 5 B. & Ad. at p. 648. No action would however lie if the statement were true.

3. *Isipiro v. La Motta*, (1923) 40 T.L.R. 201.

CHAPTER XI.

INTERFERENCE WITH CONTRACTUAL AND BUSINESS RELATIONS.

1. **Interference with contractual and business relations.**—This kind of wrong was brought into prominence during the last century on account of the development of commerce and industry and the rise of powerful combinations of various trade and labour interests. Courts have attempted to meet the situation by recognising a right of action in the following cases : (a) procurement of a breach of contract, (b) conspiracy to injure a man in his trade, business or employment, (c) improper interference by a single individual with the trade, business or employment of another.

2. **Procuring a breach of contract.**—This was recognised as wrongful in *Lumley v. Gye*,¹ where an action was allowed against the defendant who induced a singer to break off her engagement to sing in the plaintiff's theatre. Formerly a person could seek relief for interference with his contractual rights only indirectly through remedies for other torts, e.g., action for causing loss of service by enticing or abducting a servant,² action for slander of title or goods resulting in an intending purchaser of the property breaking his contract.³ Since *Lumley v. Gye* the invasion of such rights has become an independent tort. This case was followed in *Bowen v. Hall*⁴ where the defendant was held liable for procuring a brickmaker to break his contract of exclusive service with the plaintiff. It secured the approval of the House of Lords,⁵ and was rested on a principle of wide application. "The principle involved in it cannot be confined to inducements to break contracts of service nor indeed to inducements to break any contracts. The principle which underlies the decision reaches all wrongful acts done intentionally to damage a particular individual and actually damaging him."⁶ The doctrine of *Lumley v. Gye* can also be explained on the ground that a person who procures an illegal act, i.e., an act which is illegal on the part of the immediate actor, is liable whether that act is a tort or a breach of contract.⁷

3. **Points to be proved in an action for procuring breach of contract.**—In an action for this tort, the plaintiff must prove : (a) that there was a contract between himself and a third person, and (b) that the

1. (1853) 2 E. & B. 216.

2. Above, Chap. III, para. 2.

3. Above, Chap. X, para. 2.

4. (1881) 6 Q.B.D. 333.

5. *Quinn v. Leathem*, (1901) A.C. 495, 510; *South Wales Miners' Federation v. Glamorgan Coal Co.*, (1905) A.C. 239 known as the Stopday case; *Jasperson v. Dominion Tobacco Co.*, (1923) A.C. 709 (P.C.).

6. *Per* Lord Lindley in (1901) A.C. at p. 535; *per* Lord Haldane in (1923) A.C. at p. 713.

7. (1853) 2 E. & B. at p. 233.

defendant procured a breach of it knowingly, *i.e.*, with notice of the contract. It is then for the defendant to prove a lawful justification.

4. **Nature of contract broken.**—The contract may be of any description¹ and not merely a contract of service. An action was allowed against a person who induced a clerk of the plaintiff to divulge the plaintiff's trade secrets.² The contract must be a valid and subsisting one.³

5. **Mode of procuring breach of contract.**—The procurement of a breach of contract may be by physical violence or threat of it or of other harm like pecuniary loss, social or commercial boycott, or even by advice, persuasion, or inducement. The breach of contract must be the direct consequence of the defendant's words or acts. The doctrine of *Vicars v. Wilcocks*⁴ that a person cannot be liable for causing the illegal act of another was disapproved in *Bowen v. Hall*,⁵ and is no longer law. When the inducement is accompanied by threats or proceeds from a powerful person or organisation like a trade-union, the causal connection would hardly be open to doubt.⁶ On the other hand, a gentle and friendly advice given by the defendant to another who had reasons of his own to act as he did may make the defendant's responsibility doubtful. Between these extremes there may be various degrees of causal connection and it is a question of fact in each case whether it is established.⁷

6. **Malice.**—The plaintiff need not prove malice. It is for the defendant to prove a lawful justification, because knowingly to procure a breach of contract is *prima facie* wrongful.⁸ In some of the earlier cases, it was usual to speak of the wrong as 'maliciously procuring a breach of contract.'⁹ This led to the impression that malice in the sense of ill will or

1. *Jasperson v. Dominion Tobacco Co*, (1923) A.C. 709; *National Phonograph Co. v. Edison Bell Consolidated Phonograph Co*, (1908) 1 Ch. 335; *Long v. Smithson*, (1918) 88 L. J. K. B. 223; *G. W. K. Ltd. v. Dunlop Rubber Co*, (1926) 42 T.L.R. 376; as to a marriage contract, see *Colquhoun v. Fanny Smith*, (1909) 7 M.L.T. 394.

2. *Hamlyn v. Houston & Co.*, (1903) 1 K. B. 81; see also *Exchange Telegraph Co v. Gregory & Co.*, (1896) 1 Q. B. 147; *British Plastics v. Ferguson*, (1940) 1 A.E.R. 479 (H.L.).

3. *Said v. Butt*, (1920) 3 K.B. 497; see also *De Francesco v. Barnum*, (1890) 45 Ch.D. 430; cf. *Dixon v. Dixon*, (1904) 1 Ch. 101.

4. (1809) 8 East. 1; above, Chap. VII, para. 88. 5. (1881) 6 Q. B. D. 333.

6. *Read v. Friendly Society of Operative Stonemasons*, (1902) 2 K. B. 732, 737; see also *Temperton v. Russell*, (1893) 1 Q. B. 715, 726.

7. For instances, see *Allen v. Flood*, (1893) A. C. 1; *Denaby and Cadeby Main Collieries, Ltd. v. Yorkshire Miners' Association*, (1906) A. C. 384; *Stott v. Gumble*, (1916) 2 K. B. 504.

8. *South Wales Miners' Federation v. Glamorgan Coal Co.*, (1905) A. C. 239, 250; see *Fred-Wilkins v. Weaver*, (1915) 2 Ch. 322. Cf. *British Plastics v. Ferguson*, (1940) 1 A. E. R. 479 (H. L.) where knowledge was negatived on the facts.

9. *E.g.*, *Bowen v. Hall*, (1881) 6 Q.B.D. 333; *Temperton v. Russell*, (1893) 1 Q.B. 715; see also *Read v. Friendly Society of Operative Stonemasons*, (1902) 2 K.B. 732 at pp. 738, 739; *Kaunji Vassouji v. Nursi*, (1914) I.L.R. 39 Bom. 682; 17 Bom. L.R. 225.

intent to injure was the gist of the action. The true rule was laid down by Lord Macnaghten in an oft-quoted passage in *Quinn v. Leatham*¹ :

"The decision in *Lumley v. Gye* was right, not on the ground of malicious intention—that was not, I think, the gist of the action—but on the ground that a violation of legal right committed knowingly is a cause of action, and that it is a violation of legal right to interfere with contractual relations recognised by law if there be no sufficient justification for the interference."

7. **Justification.**—The scope of justification in this class of cases is uncertain and has not been clearly defined.² The broad principle underlying it may be stated to be that the defendant should have acted from a *bona fide* sense of right or duty.³ In considering whether the circumstances warrant a right or duty, regard should be had to the nature of the contract broken, the position of the parties to the contract, the relation of the defendant to them, the grounds for procuring the breach, the means employed for the purpose, etc.⁴ Some instances of justification may be mentioned as beyond question; *e.g.*, assertion of a claim under a prior or inconsistent contract,⁵ advice of a parent to his daughter to abandon her engagement with an unworthy suitor.⁶ The right or duty must be one that can be recognised by reasonable men. A person has no right to interfere with another's contract merely because it is to his benefit or advantage, as where a person desires to secure the services of a skilled workman already engaged by another and induces him to leave his employer.⁷ It is no excuse that the defendant acted *bona fide* or had no ill will towards the plaintiff. Proof of a dishonest or malicious intent will of course negative a just cause or excuse. A conspiracy to procure a breach of contract would be evidence of such intent.⁸ The principle of justification appears therefore to be analogous to that of qualified privilege in the law of defamation. But while the application of the principle in the law of privilege is well-settled and rarely presents any serious difficulty,⁹ it is here beset with highly controversial issues of economic and social policy. Courts are often called upon to

1. (1901) A. C. at p. 510.

2. *Pratt v. British Medical Association*, (1919) 1 K. B. 244, 265; see also Pollock, *Torts*, p. 263; 36 Har. L. R. 663; 39 Har. L. R. 749.

3. *Glamorgan Coal Co. v. South Wales Miners' Federation*, (1903) 2 K. B. 545 at p. 569.

4. *Per* Romer, L.J., in (1903) 2 K.B. at p. 574.

5. *Smithies v. National Association of Operative Plasterers*, (1909) 1 K. B. 310, 337; as to performance of a statutory duty; see *Stott v. Gamble*, (1916) 2 K.B. 504.

6. *Per* Stirling, L.J., in (1903) 2 K.B. 577; see also *Khunji Vassonji v. Narsi*, (1914) I.L.R. 39 Bom. 682; 17 Bom. L.R. 225; *Jekkisonadas v. Ranchoddas*, (1916) I. L. R. 41 Bom. 137; 19 Bom. L.R. 12.

7. *Bowen v. Hall*, above; see (1903) 2 K.B. at p. 574.

8. *Sweeney v. Coote*, (1906) 1 Ir. R. 51; *Pratt v. British Medical Association*, (1919) 1 K.B. 244; see also *Kearney v. Lloyd*, (1890) 26 L.R. Ir. 268. A mere conspiracy without the breach occurring before the action is not a cause of action; *De Jetley Marks v. Greenwood (Lord)*, (1936) 1 A.E.R. 863.

9. A controversial instance is the case of libels by trade-protection societies; above, Chap. VII, para. 56 (a).

pronounce on the propriety of modern methods of industrial competition, a subject on which opinion is sharply divided among large sections of the community.

8. *Illustrations of justification.*—In the well-known case of the *South Wales Miners' Federation v. Glamorgan Coal Co.*,¹ the officials of a trade-union were held liable for ordering a large body of workmen, 1,00,000 in number, to strike or stop work on a particular day in breach of existing contracts with various collieries, and it was held to be no excuse that they had no ill will towards the employers but acted honestly for the purpose of preventing the attempted reduction of the price of coal by merchants and middlemen and the consequent fall in wages of workmen. This case in so far as it held that the furtherance of a trade dispute was no excuse, was nullified by the Trade Disputes Act, 1906.² Similarly it was held that a trade-union was not justified in inducing workers to remain on strike in breach of their contracts for the purpose of putting pressure on their employer and preventing his evading or breaking another independent contract.³ In *Temperton v. Russell*,⁴ the defendants, members of a committee of trade-unions of builders, were held liable for maliciously procuring a breach of contract though they had no personal ill will towards the plaintiff but intended thereby to compel the plaintiff to stop supplying building materials to a firm of builders who had refused to obey certain rules laid down by the unions. The fact that in these and similar cases the defendants acted honestly in the ultimate interests of themselves or their class was not accepted as a sufficient justification. In *Camden Nominees v. Forcey*⁵ the defendants who were two tenants in a block of flats belonging to the plaintiffs were held liable for organising an opposition by all the tenants to refuse to pay their rents if certain complaints against the landlords for non-performance of their obligations were not redressed. On the other hand, in *Brimelow v. Casson*,⁶ it was held that the defendants, members of a theatrical association called the Joint Protection Committee, were justified in inducing theatre proprietors not to allow the plaintiff, a theatrical manager, the use of their theatres either by breaking contracts already made or by refusing to enter into contracts, because the defendants thereby wanted to stop the under-payment by the plaintiff of his chorus girls who were, for want of a living wage, forced to supplement

1. (1905) A.C. 239; see also *Larkin v. Long*, (1915) A.C. 814.

2. Below, para. 9.

3. *Smithies v. National Association of Operative Plasterers*, (1909) 1 K.B. 310, 337; see also *Conway v. Wade*, (1909) A.C. 506; below, para. 25.

4. (1893) 1 Q.B. 715.

5. (1940) 1 Ch. 352.

6. (1924) 1 Ch. 302; see Sir F. Pollock's article in support of this decision in 40 L.Q.R. p. 139; but see Salmend, *Torts*, p. 390 f.n. (2). See also *De Jellie Marks v. Greenwood*, (1936) 1 A.E.R. 863.

their earnings by leading immoral lives. It was held that the defendants were only discharging a duty to their calling and to the public.

9. Trade Disputes Act, 1906.¹—This statute enacts:

"An act done by a person in contemplation or furtherance of a trade dispute shall not be actionable on the ground only that it induces some other person to break a contract of employment."

"Trade dispute means any dispute between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment or the terms of employment or with the conditions of labour, of any person.

This Act was a great victory for trade-unions in England who were thus protected in organising strikes even in breach of existing contracts. The Trade Disputes and Trade Unions Act, 1927² withdraws the protection in the case of a strike or a lock-out which has any object other than or in addition to the furtherance of a trade dispute within the trade or industry in which the strikers or employers locking out are engaged, and is designed or calculated to coerce the Government either directly or by infliction of hardship on the community. This Act was the result of the general strike in England in May, 1926.

10. Conspiracy.—The action for conspiracy in the mediaeval English law was the remedy for damage done by combinations to pervert justice and was ultimately superseded by the action for malicious prosecution.³ In the modern law of torts, it is the remedy for damage done by certain forms of concerted action in the course of trade and industry. In that sense it is the creation of the case-law of quite recent times. In the English criminal law, however, the term 'conspiracy' has a much longer standing. It originally referred to particular kinds of combinations which were made punishable by various mediaeval statutes, *e.g.*, combinations to pervert justice,⁴ to raise prices⁵ or wages.⁶ In course of time and owing mainly to the influence of the Court of Star Chamber which punished all conspiracies against the public interest, the offence became generalised in its modern form, and was defined as "an agreement between two or more persons to do an illegal act or an act which is not illegal by illegal means."⁷ A similar definition was added to the Indian Penal Code⁸ in 1919, the immediate occasion and object being the suppression of seditious and anarchical associations in this country. The civil wrong differs from the crime of conspiracy in that damage is essential in a civil action

1. 6 Ed. 7, c. 47.

2. 17 & 18 Geo. 5, c. 22, S. 1. For an interesting criticism of its policy, see W. A. Robson, 51 L.Q.R. 205, 206.

3. Above, Chap. VIII, para. 2.

4. Above, Chap. VIII, para. 2.

5. Below, para. 14.

6. Below, para. 18.

7. *Mulachy v. R.*, (1868) L.R. 3 H.L. 317, *per* Willes, J.

8. S. 120-A, added by the CrL Law Amendment Act (VIII of 1919), S. 3.

while the mere agreement is regarded as a public danger and made a punishable offence. The damage in this class of actions is usually loss of employment, business, or trade.

11. The element of 'conspiracy' in relation to the tort.—The place occupied by the element of conspiracy in the composition of the civil wrong now known by that name has been the subject of controversy. It may be useful to consider here the relation which conspiracy may bear to other independent torts. It may be material in the following ways: (a) It may be a circumstance of aggravation,¹ e.g., a concerted assault, libel, or inducement to break a contract. (b) It may be evidence of the causal connection between the conduct of the wrongdoers and the resulting damage, as the pressure of numbers can often achieve what a single person cannot, e.g., dismissal of a workman in breach of a contract of employment by an employer at the request and out of fear of a powerful trade-union. (c) It may be evidence of malice or the absence of a proper motive or justification, e.g., a conspiracy to hiss an actor when he appears on the stage.² (d) It would prove the joint liability of two or more persons for the same tort.³ In these cases the element of conspiracy is collateral to or evidentiary of an independent tort, because even a single individual who does similar harm will be liable. The modern doctrine of 'actionable conspiracy' is that a conspiracy maliciously to injure a person in his trade, business, or employment and resulting in damage to him is actionable though the damage if caused by a single person may not be actionable. The leading authority for the doctrine is *Quinn v. Leathem*.⁴ Two other decisions of the House of Lords have also a bearing on the subject, viz., *Mogul Steamship Co. v. McGregor*,⁵ and *Allen v. Flood*.⁶ These cases, described as "the famous trilogy,"⁷ may be considered in their chronological order. This trilogy however did not represent the last word on the subject and has been supplemented by two other decisions⁸ of the House of Lords, *Sorrell v. Smith* and the recent one in *Crofter Harris Tweed Co. v. Veitch* which perhaps has helped more than the previous cases to clarify this difficult branch of law.

12. *Mogul Steamship Co. v. McGregor*.—The defendants who were a firm of shipowners trading between China and Europe, with a view to

1. *Weston v. Peary Mohan Dass*, (1912) 1 L.R. 40 Cal. 898, 951.

2. *Gregory v. Duke of Brunswick*, (1844) 6 M. & G. 205, 953; above, Chap. VII, para. 74 (a).

3. *Kearney v. Lloyd*, (1890) 26 L.R. Ir. 268, at p. 280; below, Chap. XIX, para. 25.

4. (1901) A.C. 495. 5. (1889) 23 Q.B.D. 598; (1892) A.C. 25. 6. (1898) A.C. 1.

7. *Per Viscount Cave in Sorrell v. Smith*, (1925) A.C. 700 at p. 711.

8. Below, para. 13. "We hope that in the interest of the national drive for salvage the famous trilogy of cases together with *Sorrell v. Smith* may be confined to the scrap-heap;" 58 L.Q.R. 150.

obtain for themselves a monopoly of the homeward tea trade and thereby keep up the rate of freight, formed themselves into an association, and offered to all such merchants and shippers in China as shipped their tea exclusively in vessels belonging to members of the association, a rebate of five per cent. on all freights paid by them. They denied this concession to those who shipped goods in non-association steamers like those of the plaintiffs who were rival shipowners. The defendants thereby caused serious loss of business to the plaintiffs. It was held, however, that they were not liable; because, first, they combined only to advance their own trade interests and not maliciously to injure the plaintiffs; secondly, they did not adopt any illegal means like fraud, intimidation or molestation, *e.g.*, driving away customers by show of violence, impeding or threatening servants or workmen, inducing a breach of contract; thirdly, there was no indictable conspiracy by the mere fact that the agreement between the defendants was illegal in the sense that it was in restraint of trade and void or unenforceable. The decision in this case has been regarded as of high authority and followed in England and in India.¹

13. Illustrations of the right of trade combination.²—The following are some well-known cases applying the rule in the *Mogul* case in favour of trade combination.

*Ware and De Freville, Ltd. v. Motor Trade Association.*³: The plaintiffs were dealers in motor cars. The defendants were an association of motor manufacturers and its officers. The association for the purpose of regulating prices provided by its bye-laws that on proof that any person sold motor articles at a price different from that fixed by its members, his name would be placed in a list called 'the stop-list,' and notice would be given to all its members to stop dealing with him. The plaintiffs, who were not members of the association, advertised on behalf of a customer, a car for sale at a price higher than that fixed by the manufacturer, a member of the association. The association thereupon placed the plaintiffs' name on the stop-list and published it in trade journals. In an action to restrain the publication the Court of Appeal held that it was done *bona fide* in the protection of the trade interests of the defendants and was not wrongful.

*Sorrell v. Smith.*⁴: The plaintiff, a retail news-agent withdrew his custom from a wholesale news-agent *R*. He did this at the instance of a trade-union of retail news-agents who with a view of limiting the number of retail newspaper shops in a certain area, wanted to put pressure on *R* to stop supplying newspapers to certain newcomers who opened shops without the union's permission. The defendants, an association of newspapers, disapproved of the said policy of the trade-union and wanted the plaintiff to resume his business with *R*. In order to compel the plaintiff to do so, they threatened to discontinue the supply of newspapers to *W*, and to *S* who supplied *W* with newspapers, so long as *W* supplied the plaintiff. An action to restrain the defendants from interfering with the right of the plaintiff to continue contractual relations with *W* was dismissed by the House of Lords on the ground that the defendants acted only with a view to advance their own interests and had not committed or threatened to commit any wrong.⁵ In the

1. *Bholu v. Lachmi Narain*, (1931) I.L.R. 53 All. 316.

2. For another instance, see *Reynolds v. Shipping Federation*, (1924) 1 Ch. 28.

3. (1921) 3 K.B. 40.

4. (1925) A.C. 700.

5. (1925) A.C. at pp. 724, 733.

view of their Lordships, malice is an essential ingredient in an action for conspiracy and was absent in that case.¹

Thorne v. Motor Trade Association.² : Here as in *Ware and De Freville's* case a 'stop-list' in the motor trade was in question but the subject of a criminal prosecution. The House of Lords held that the demand of payment of a fine as an alternative to placing a person's name on the stop-list was not punishable under the Larceny Act which makes it an offence to demand money with menaces and without any reasonable or probable cause. The decision of the Court of Appeal in *Ware and De Freville's* case was approved.

Crofter Harris Tweed Co. v. Veitch.³ : The plaintiffs were seven producers of tweed cloth in the island of Lewis in the Outer Hebrides. They purchased yarn from the mainland and had it woven into tweed by the crofters in their own houses. This tweed could be sold at a much cheaper price than tweed woven by crofters from yarn spun by the spinning mills in the island. The defendants were officials of a trade-union whose members were the workpeople in the spinning mills as well as dockers on the dock in the island. The trade-union desired to enable the mills to raise the wages of the workpeople and for that purpose to raise the price of tweed. With this object in view the defendants imposed an embargo at the chief port of the island on the export of all tweed made from mainland yarn and on the import of such yarn, thereby making the dock people refuse to handle the yarn consigned to producers like the plaintiffs or the tweed exported by them. The result was to enable island-spun yarn produced by the mills to be sold but also to destroy the business of the producers like the plaintiffs. The House of Lords dismissed an action by the plaintiffs for an injunction to compel the defendants to raise the embargo. It was held that the defendants' real or predominant purpose or object was the test and as that object was to benefit the employees who were members of the union there was no conspiracy to injure.

14. Policy of the law allowing trade combination.—The decision in the above cases gives effect to the economic theory that 'free competition is worth more to society than it costs,'⁴ and that it is undesirable to place restrictions on trade competition by individuals or combinations of individuals, though it may inflict injury on other persons or even on the public by keeping up prices. But in mediaeval England a different policy prevailed, and Parliament had passed statutes⁵ forbidding trade operations by individuals or combinations to raise prices of goods or to obtain a monopoly in any particular trade. The mediaeval system broke down with the expansion of trade and industry, and gave way to the doctrines of "free competition" and "*laissez faire*" preached by Adam Smith and Mill.

1. The onus is on the plaintiff to prove it, and not for the defendant to show a just cause; *per* Lord Buckmaster, *ibid.*, at p. 748. 2. (1937) A.C. 797.

3. (1942) 2 A.E.R. 142; 1943 A.C. 435.

4. *Per* Holmes, J., in *Vegeahn v. Guntner*, (1896) 167 Mass. 92; Wigmore, Cases on Torts, Vol. II, p. 373.

5. These statutes, *e.g.*, (1552) 5 & 6 Ed. 6, c. 14, punished offences known as 'forestalling' (buying of goods on their way to the market), 'ingrossing' and 'regrating,' (buying of goods wholesale and selling them wholesale). See on this subject, Stephen, History of Crim. Law, Vol. III, p. 199; Winfield, History of Conspiracy, p. 111; Holdsworth, Vol. III, p. 375.

The old statutes became obsolete and were finally repealed.¹ In modern times many western countries have reverted to the policy behind the mediæval English statutes and have in the public interest passed laws imposing restrictions on the operations of large combinations like trusts and cartels.²

15. *Allen v. Flood*.³—The plaintiffs were two 'shipwrights' or workers on the wooden parts of a ship. They had been engaged on repairs of a ship on the ironwork of which certain ironworkers called 'boiler-makers' were also engaged. The ironworkers came to know that the plaintiffs had previously been employed for doing the ironwork of another ship and thereupon resolved in a meeting of their union not to work with the plaintiffs. The defendant, Allen, who was an official of the union communicated their decision to the plaintiffs' employers who thereupon discharged the plaintiffs. As the plaintiffs had been engaged from day to day and their employers did not commit a breach of contract in discharging them, the defendant could not be held liable for procuring a breach of contract. There was a claim against him for conspiring with two other 'officers of his union but this was not considered for want of evidence to support it. Therefore the question for decision was whether the defendant was liable for maliciously injuring the plaintiffs by inducing their employers to do something which it was lawful for the employers to do, *viz.*, to refuse to employ or enter into a contract with the plaintiffs. The House of Lords answered it in the negative, and thus overruled a contrary opinion expressed in *Temperton v. Russell*.⁴ The case occasioned a great deal of discussion about the place of malice in legal liability and is regarded as authority for the proposition that the existence of a bad motive in the case of an act not in itself illegal, will not convert that act into a civil wrong. This proposition in spite of its apparent generality, has no application to damage done by a malicious conspiracy to injure a person.⁵

16. *Quinn v. Leathem*.⁶—The defendants were a trade-union of butchers in Belfast. The plaintiff, Leathem, was a meat seller and he

1. (1772) 12 Geo. 3, c. 71; (1844) 7 & 8 Vict., c. 24.

2. In the U. S. A., the Sherman Anti-Trust Act, 1890; the Clayton Act, 1914; see Kales, *Cases on Contracts and Combinations in Restraint of Trade*, Vol. II, pp. 763, 1229; as to anti-trust laws in some of the British Dominions and in Germany, see Haslam, *Law Relating to Trade Combinations*, Chap. VI. In England the question was considered by a committee appointed in February, 1918; *ibid.*, p. 139.

3. (1898) A. C. 1; (1895) 2 Q. B. 21 (C.A.).

4. (1893) 1 Q. B. 715.

5. *Sorrell v. Smith*, (1925) A. C. 700 at pp. 724, 733; *Thorne v. Motor Trade Association*, (1927) A. C. 797, *per* Lord Wright. The cases which applied the rule to conspiracies seem therefore to be of doubtful authority now, *e.g.*, *White v. Riley*, (1921) 1 Ch. 1; *Davies v. Thomas*, (1920) 2 Ch. 189; *Wolstenholme v. Ariss*, (1920) 2 Ch. 403.

6. (1901) A.C. 495.

employed men who were not members of the trade-union. The defendants resented this and called upon the plaintiff to discharge his men, though he offered to pay up all fines due by them and have them admitted into the union. The defendants however insisted on their demand, and on the plaintiff failing to comply with it, procured one Munce, a customer of the plaintiff, to stop buying meat from the plaintiff, by threatening Munce that otherwise they would ask his employees to stop work. They also issued 'black lists' containing names of traders who had dealings with the plaintiff and one of them stopped buying from the plaintiff in consequence. It was held that the defendants were liable for conspiring maliciously to injure the plaintiff by inducing his customers and servants not to deal with him or continue in his employment. This case was followed in *Giblan v. National Amalgamated Labourers' Union of Great Britain and Ireland*.¹ The defendants, officers of a trade-union, in order to compel the plaintiff, a workman and member of the union, to pay certain dues to the union, prevented his obtaining employment by threatening his employers that they would call out their men if he was retained. The defendants and their union were held liable on the ground that their motive was to injure the plaintiff. These cases led to agitation by trade-unions resulting in the Trade Disputes Act, 1906.² It enacts :

"An act done in pursuance of an agreement or combination by two or more persons shall if done in contemplation or furtherance of a trade dispute,³ not be actionable, unless the act, if done without any such agreement or combination, would be actionable."

Therefore, the doctrine of *Quinn v. Leathern* was nullified just in that class of cases for which it was evidently intended.⁴ The occasion for invoking it in other than trade-union cases is rare.⁵ In *Pratt v. British Medical Association*,⁶ a doctor obtained damages against the British Medical Association for conspiracy to procure his boycott by other members of the profession resulting in loss of practice. In India, the position is similar to

1. (1903) 2 K. B. 600.

2. The protection conferred by this Act is qualified by the Act of 1927 already stated. It was so held even independently of this Act; *National Sailors' and Firemen's Union v. Reed*, (1926) Ch. 536.

3. For its definition, see above, para. 9; for its interpretation, see *Cowway v. Wade*, (1909) A.C. 506; *Larkin v. Long*, (1915) A.C. 814; *Valentine v. Hyde*, (1919) 2 Ch. 129; *Hodges v. Webb*, (1920) 2 Ch. 70; *White v. Riley*, (1921) 1 Ch. 1; *Dallimore v. Williams*, (1914) 30 T.L.R. 432.

4. The doctrine is followed by many Courts in the U.S.A.; Cooley, Torts, Vol. II, p. 598; Burdick, Torts, pp. 83, 326.

5. For instances in India, see *Weston v. Peary Mohan Dass*, (1912) I.L.R. 40 Cal. 898; 18 C.W.N. 185; *Hem Chandra v. Bepin Behary* (1920) I.L.R. 47 Cal. 1079; 24 C.W.N. 800; *Ambika Prasad v. Whitwell*, (1907) 6 C.L.J. 118; *Templeton v. Laurie*, (1900) I.L.R. 25 Bom. 230; 2 Bom. L. R. 244.

6. (1919) 1 K.B. 244; cf. *Thompson v. New South-Wales Branch of the British Medical Association*, (1924) A.C. 764.

that in England, by reason of the Indian Trade Unions Act, 1926,¹ which exempts registered trade-unions and their officers from being sued in respect of any act done in furtherance of a trade dispute.

17. **Points to be proved in an action for conspiracy.**—In this action the plaintiff has to prove conspiracy, malice and damage. Malice means an improper motive to injure the plaintiff and excludes the legitimate motive of advancing the defendant's interests. As these motives are often inseparably mixed in this class of cases,² the burden of proving malice would ordinarily be difficult to discharge.³ In *Quinn v. Leathem* the decision proceeded on a finding of malice, but it is quite arguable that the defendants acted also in the interests of their union as they conceived them.⁴

18. **Historical background of the doctrine of *Quinn v. Leathem*.** The history of the law of conspiracy in its application to labour combinations in England is a subject of considerable interest. A reference to some of its salient incidents will show the part played by the courts in the long and eventful controversy between capital and labour, and the place occupied by the decision in *Quinn v. Leathem* in the history of that controversy. (a) *Before 1825.*—The economic theory of mediaeval England involved state regulation not merely of prices but of wages and the prohibition of combinations of traders as well as of workmen.⁵ But while the statutes against trade combinations had become obsolete by the eighteenth century, those against combinations of workmen continued in a stringent form till 1824, when they were repealed and combinations of workmen as well as employers were declared lawful by Parliament.⁶ (b) *1825-1875.*—An Act of 1825,⁷ however, made it a punishable offence for any person by violence to person or property, by threats, intimidation, molestation or obstruction, to force any workman to give up

1. Act XVI of 1926, S. 18. The Trade Disputes Act (VII of 1929), S. 16 like the English Act of 1927 makes a general strike illegal. It also makes provision for investigation and settlement of trade disputes. For a case under this Act, see *R. v. Aiwe*, (1935) 37 Bom. L. R. 892. 2. *Per* Lord Sumner in *Sorrell v. Smith*, (1925) A.C. at p. 739.

3. *Dallimore v. Williams*, (1912) 29 T.L.R. 67 (addition of bad motive does not take away the defence of trade disputes); *Pissay v. Hanumantha Rao*, 20 Mys. L. J. 131.

4. *Per* Lord Lindley in (1901) A.C. at p. 536; *per* Scrutton, L.J., in (1921) 3 K.B. at p. 67; *per* Viscount Maugham in *Croftier Harris Tweed Co. v. Veitch*, (1942) 1 A.E.R. at p. 153; Holmes, J., in *Vogelahn v. Guntner*, (1896) 167 Mass. 92; Wigmore, Cases on Torts, Vol. II, p. 373. The attitude of judges in this class of cases has been contrasted with that in the *Mogul* case and other cases allowing capitalistic methods of trade-war and boycott and has been characterised as unfair; Webb and Webb, History of Trade Unionism, p. 598; as to the danger of judges being influenced by class sympathy, see Scrutton, L.J., (1921) 1 Camb. L. J. 6. at p. 8 cited in Haslam, Law Relating to Trade Combinations, p. 193; see also below, Chap. XIV, paras. 32 and 60; Chap. XVI, para. 19.

5. On this subject, see Stephen, History of Crim. Law, Vol. III, pp. 203-227; Harrison, Law of Conspiracy, pp. 122-144; Holdsworth, Vol. IV, p. 379.

6. 5 Geo. 4, c. 95.

7. 6 Geo. 4, c. 129.

any employment, or any employer to alter his method of managing his business. During the next fifty years the law was distinctly unfavourable to organised labour. In the first place, courts held that trade-union methods like strike, boycott and picketing amounted to intimidation and molestation and were punishable under this Act.¹ They also enunciated the doctrine that such methods were indictable as well as actionable at common law.² Besides, courts also held that a combination of workmen to raise wages was in restraint of trade and illegal, and therefore a criminal conspiracy.³ The result of these views was that workmen and their leaders were punished in several criminal prosecutions.⁴ (c) 1875-1901.—This led to the alteration of the law by the Conspiracy and Protection of Property Act, 1875,⁵ which enacted :

“An agreement or combination by two or more persons to do or procure to be done any act in contemplation or furtherance of a trade dispute between employers and workmen shall not be indictable as a conspiracy if such act committed by one person would not be punishable as a crime.”

By obtaining this enactment trade-unions scored a great victory over courts of law. But they had soon other difficulties to face. Though they could not be prosecuted, it was held that they could be sued in civil actions for damages in certain cases. In the first place, the principle enunciated in *Lumley v. Gye*⁶ and affirmed in *Bowen v. Hall*⁷ could be used against them when they procured a breach of contract of employment. It was so used in *Temperton v. Russell*.⁸ Secondly, it was held in the last mentioned case that they could be sued also for maliciously inducing a person not to enter into a contract. This doctrine suffered a temporary set-back⁹ on account of the decision in *Allen v. Flood*¹⁰ but was reaffirmed in *Quinn v. Leathem*.¹¹ At the same time the House of Lords also held in the *Taff Vale* case¹² that a trade-union though an unincorporated body could be sued and made to pay damages from its funds. These decisions were undoubtedly pieces of judicial legislation intended to meet what the judges considered a new social evil. “The House of Lords first invented a new civil offence and then created a new kind of defendant against whom it could be

1. Stephen, History of Crim. Law, Vol. III, pp. 217, 218; Haslam, Law Relating to Trade Combinations, pp. 66-69; *Skinner v. Kitch*, (1867) L.R. 3 Q.B. 398.

2. See the report of Erle, C.J., as President of the Royal Commission on Trade Unions, (1867); see also Report of the Royal Commission on Trade Disputes, 1906.

3. *Hilton v. Eckersley*, (1856) 8 E. & B. 47; *Walsby v. Anley*, (1861) 30 L.J. M.C. 121.

4. E.g., *R. v. Rowlands*, (1851) 5 Cox. C.C. 436; *R. v. Druitt*, (1867) 10 Cox. C.C. 592; Webb & Webb, History of Trade Unionism, pp. 278-9.

5. 38 & 39 Vict., c. 86, S. 3.

6. (1853) 2 E. & B. 216; above, para. 2.

7. (1881) 6 Q.B.D. 333; above, para. 2.

8. (1893) 1 Q.B. 715; above, para. 8.

9. E.g., *Huttley v. Simmons*, (1898) 1 Q.B. 181 decided by Darling, J., a few days after *Allen v. Flood*.

10. (1898) A.C. 1.

11. (1901) A.C. 495.

12. (1901) A.C. 426; another was the *Glanorgan* case, (1903) 2 K.B. 545.

alleged.”¹ These cases led to serious discontent in the ranks of labour which thereupon proceeded to organize itself as a political party and secured their reversal by Act of Parliament in 1906.

19. Rational basis of the doctrine of *Quinn v. Leatham*.—The rational basis of the doctrine is involved in considerable uncertainty and difficulty. There are three different views. They are set out in the following three paragraphs.

20. The civil wrong must be also a criminal offence.—A combination to injure a person by interference with his trade, business or employment is an indictable conspiracy under the common law; therefore it is actionable if followed by damage, though a single individual causing the same damage may not be liable. This theory was propounded in *Quinn v. Leatham*² by Lord Brampton, and in *Sorrell v. Smith*³ by Lord Dunedin who accepted its logical corollary, *viz.*, that there can be no civil action for conspiracy on facts which fall short of a criminal conspiracy. This view assumes that the crime of conspiracy is very wide in its ambit.⁴ It does not appear to be warranted by the definition of the crime as an agreement to do an ‘illegal act,’ *i.e.*, an act which is *per se* an offence, or a civil wrong, or is prohibited by law.⁵ It sounds like a distant echo of the doctrine that prevailed in the middle of the last century and was superseded by the legislation of 1875. It is inapplicable to a combination of workmen acting in furtherance of a trade dispute.⁶ There has been no prosecution on facts similar to those in *Quinn v. Leatham* since 1875, nor is one likely to succeed.

21. Conspiracy is only evidentiary.—The second view is that conspiracy has only an evidentiary value and an action will lie even against a single individual for acting as the defendants in *Quinn v. Leatham* did. Two different kinds of causes of action have been suggested. (a) Intentionally to cause damage to another in his property or trade is actionable if there is no just cause or excuse. (b) A person is liable for procuring another to do an act which may be lawful for the latter to do, if the former employs illegal means like intimidation, molestation or coercion; and a

1. Jenks, *A Short History of English Law* (2nd Ed.), p. 337; see also 51 L.Q.R.205.

2. (1901) A.C. at p. 528.

3. (1925) A.C. at p. 725.

4. Holdsworth, Vol. VII, p. 397; *per* Bowen, L.J., in 23 Q.B.D. at pp. 616, 620.

5. I.P.C., S. 43.

6. The phrase meant under the Act of 1875, a dispute between employers and workmen, and would appear to apply to the dispute between Leatham and the defendants in *Quinn v. Leatham*. The phrase is not employer and his workmen; but see *per* Lindley, L.J., in (1901) A.C. at p. 536. It is doubtful if there was a dispute between Muncie and the defendants so as to justify their threatening a secondary or sympathetic strike of his workmen but the doubt was intended to be removed by the wider definition in the Act of 1906; *per* Loreburn, L.C., in *Conway v. Wade*, (1909) A.C. at p. 511.

threat to procure a person's customers, employers or workmen to leave him amounts to such means. The first rule was propounded by Bowen, L.J., in the *Mogul* case,¹ and accepted by Lord Lindley in *Quinn v. Leatham*. On that view, conspiracy would be evidence of malice or absence of just cause. The second view lays emphasis on unlawful intimidation or threats. It was suggested by Lord Halsbury's judgment in *Quinn v. Leatham*² and adopted among others by Justice McCardie in *Pratt v. British Medical Association*.³ These views were however rejected in the *Ware and De Freville* case⁴ by Atkin, L.J., whose judgment was cited with approval in *Sorrell v. Smith*⁵ by Lords Dunedin and Buckmaster. The view that conspiracy was only an incidental feature in *Quinn v. Leatham* was characterised by Lord Dunedin as "the leading heresy."⁶ Though the position cannot be taken as quite settled, the approved doctrine now appears to be that malice and conspiracy are the constituent elements in the cause of action and would render unlawful even acts which may be lawful if done by a single individual. Threats by themselves cannot be a cause of action as there may be a threat on the part of many to do what they have a right to do, e.g., to stop work. Therefore a number of people procuring the discharge of a fellow servant by telling their employer that otherwise they will leave his service are not liable on the mere ground of intimidation.⁷ But if they acted maliciously the result would be different.⁸

22. Malicious conspiracy is the gist of the wrong.—The third view is to rest the doctrine on a ground of policy, viz., that a malicious conspiracy of two or more persons to injure another is such a powerful source of mischief and annoyance that courts must afford civil redress for the person injured by it.⁹ This view steers clear of the difficulties in attempting to deduce the doctrine from well-known rules of legal liability. This was the view upheld in the recent decision of the House of Lords already referred to. There must be a conspiracy to injure and where there are mixed motives behind the acts complained of, the *real and predominant motive or*

1. 23 Q.B.D. at p. 613; below, paras. 24 and 25.

2. (1901) A.C. at p. 507; also *per* Lord Lindley, at p. 539.

3. (1919) 1 K.B. 244; see also *Ware and De Freville, Ltd. v. Motor Trade Association*, (1921) 3 K.B. at pp. 50-91 *per* Scrutton, L.J.; *Valentine v. Hyde*, (1919) 2 Ch. at pp. 149, 150, *per* Astbury, J.; *Kearney v. Lloyd*, (1890) 26 L.R. Ir. 268; *Sweeney v. Coote*, (1906) 1 Ir. R. 51, 109; G. C. Cheshire, 39 L.Q.R. at pp. 207-11.

4. (1921) 3 K.B. 40 at p. 91.

5. (1925) A.C. at pp. 726, 747; see also *Thorne v. Motor Trade Association*, (1937) A.C. 797.

6. (1925) A.C. at p. 719.

7. *Allen v. Flood*, (1898) A.C. at p. 129; *White v. Riley*, (1921) 1 Ch. 1. As regards the suggested distinction between threats and warning, see *Sunfen v. Busnach*, (1913) 29 T.L.R. 214; *Pratt v. British Medical Association*, (1919) 1 K.B. at p. 261.

8. *Per* Atkin, L.J., in (1921) 3 K.B. at p. 83.

9. *Per* Lord Lindley in (1901) A.C. at pp. 538, 542; *Vegelahn v. Guntner*, (1896) 167 Mass. 92; Wigmore, Cases on Torts, Vol. II, 373 at p. 378, *per* Holmes, J.

purpose must be ascertained. If that motive or purpose is to advance the trade-interests of the persons acting who *bona fide* or honestly believe that their interests would suffer unless they so act, there is no actionable conspiracy.¹

23. Interference with trade or business by a single individual.—An action lies in the following cases against a single individual for causing injury to another by interfering with the latter's trade, business or employment: (a) The interference may be by means of the commission of a crime or tort, *e.g.*, libel, injurious falsehood. (b) A person may cause injury to another by procuring a third person to do an act which it is not lawful for that person to do, *e.g.*, a tort or breach of contract. (c) He may cause injury to another by procuring a third person to do an act which it is lawful for that person to do, *e.g.*, not to enter into a contract, or to have trade or business dealings with the latter. In such a case he is liable if he procures the act by illegal means,² *e.g.*, a crime or tort or a threat of it, as by dissuading one's customers or servants by violence or threat of violence,³ nuisance,⁴ threat to injure property or to institute vexatious legal proceedings.⁵ The person compelled by illegal means to act against his will would also have a remedy against the wrongdoer.⁶

24. Theory that intentionally causing damage to another is *prima facie* actionable.—Besides the above, another cause of action has been suggested, *viz.*, to intentionally cause damage to another in his property or trade is actionable unless the person causing it had a just cause or excuse. This doctrine was propounded by Bowen, L.J., in the *Mogul* case⁷ and was commended by Sir Frederick Pollock.⁸ But it has also been the subject of criticism.⁹ It appears to be inconsistent with *Allen v. Flood*, if that case is understood to decide that it is not unlawful to induce a person's employers not to employ him. It has however been suggested

1. *Crofter Harris Tweed Co. v. Veitch*, (1942) 2 A.E.R. at p. 154 per Lord Simon, L.C.; at p. 157, per Lord Wright.

2. Per Lord Watson in *Allen v. Flood*, (1898) A.C. at p. 96. In *Nam Kee v. Ah Fong*, (1934) I.L.R. 13 Rang. 175, an action for damages for improperly obtaining from the Local Government an order staying the issue of a pawn-broker's licence to the plaintiff was dismissed on the ground that the alleged illegal means, *viz.*, false statements in the petition for stay, were not proved. This appears to be a case of alleged injurious falsehood and would fall under the first head aforesaid.

3. *Tarleton v. McGawley*, (1793) 1 Peake 270; *Garret v. Taylor*, (1620) Cro Jac. 567; *Hem Chandra v. Bepin Behari*, (1920) I.L.R. 47 Cal. 1079; 24 C. W. N. 800.

4. *Keeble v. Hickeringill*, (1707) 11 Mod. 75; *Lyons v. Wilkins*, (1896) 1 Ch. 811; (1899) 1 Ch. 255; above, Chap. VI, paras. 26 and 39.

5. *Ware and De Preville Ltd. v. Motor Trade Association*, (1921) 3 K.B. at p. 83; *Allen v. Flood*, (1898) A.C. at p. 105.

6. *Allen v. Flood*, (1898) A.C. at p. 98.

7. 23 Q.B.D. at p. 613; for a wider rule by the same learned judge, see *Skinner & Co. v. Shew & Co.*, (1893) 1 Ch. 413, 422; below, Chap. XIII, para. 4.

8. *Torts*, p. 260.
9. (1898) A.C. at p. 139, per Lord Herschell; *Ware and De Preville Ltd. v. Motor Trade Association*, (1921) 3 K.B. at pp. 70, 78; Arthur Cohen's Memorandum in the Report of the Royal Commission on Trade Disputes 1906, at p. 29.

that the decision may be explained, consistently with the above doctrine, to rest on other grounds, *viz.*, (a) that Allen had a just cause or excuse in protecting the interests of the members of his trade-union¹; (b) that he did nothing more than communicate the fact that his men had already decided to stop work unless the plaintiffs were discharged, and was only their mouthpiece for communicating their decision.² It has also been suggested that even on the assumption that he told the plaintiffs' employers that he would call out his men unless the plaintiffs were discharged, he would not be liable if he had a right to do so by virtue of his position in the union.³ Apart from the above difficulty due to precedent, the doctrine is also open to the criticism that it is too wide and makes the sphere of justification vague and indefinite. For instance, a person has a right to employ or not to employ a servant, to serve or not to serve another, to deal or not to deal with another, to trade or not to trade: It is good law since the *Gloucester Grammar Schoolmaster's* case⁴ that one person cannot sue another for injury due to the latter exercising his right to trade. Damage resulting from the exercise of these rights is not actionable though it is caused maliciously.⁵ The position is the same where a person tells another that he proposes to exercise any of these rights and thereby causes injury to a third person.⁶ If A tells B that he cannot serve B unless C is discharged, C cannot sue A though A acted maliciously to injure C. Similarly in cases of injury to property, a person is not liable if he exercises a right of user of his own property, *e.g.*, by excavating his land, and thereby intercepts the flow of underground water to his neighbour. In these cases there is no need to show a justification, because there is no cause of action at all.⁷ Therefore the doctrine suggested above has no application to cases where a person exercises his absolute rights of property or trade.

25. Intentional interference with another's trade, business or employment.—The above theory may have, however, a narrower application.

1. *Per* Lord Herschell in (1898) A.C. at p. 132; *Per* Lord Shand in (1901) A.C. at 514.
2. *Per* Lord Watson in (1898) A.C. at p. 99; *per* Lord Herschell at pp. 130, 138; Lord Macnaghten at p. 151; Lord Shand at p. 162.

3. *Per* Lord Lindley in (1901) A.C. at p. 537; *Ware and De Freville, Ltd. v. Motor Trade Association*, (1921) 3 K.B. at p. 87; *Hodges v. Webb*, (1920) 2 Ch. 70 at p. 93.

4. (1411) Y.B. 11 Hen. IV, 47, pl. 2; above, Chap. I, para. 27. See *Purushottamdas v. Bai Dahi*, I.L.R. 1940 Bom. 339 : 1940 Bom. 205; above, Chap. X, para. 6.

5. *Allen v. Flood*, (1898) A.C. at pp. 139, 165, 166. See *Raghudan v. Erraiya*, 1938 Mad. 881 (plaintiff can have no exclusive right to do scavenging work and prevent others doing it.)

6. *Hodges v. Webb*, (1920) 2 Ch. 70; *Sorrrell v. Smith*, (1925) A.C. at p. 714. A demand of money on threat of exercising one's rights may be a criminal offence; *Thorne v. Motor Trade Association*, (1937) A.C. at p. 806.

7. (1898) A.C. at p. 139. See *K'haji Sahib v. Nansappa*, I.L.R. (1939) Mad. 833; *Syed Pichai v. Devaji Rao*, 1937 Mad. 21 (no injunction to prevent defendants building a mosque on their land).

For instance, it would be reasonable to hold a person liable for intentional interference with another's trade, business or employment by inducing the latter's employers, workmen or customers to leave him, unless the former had a just cause or excuse. This rule has the support of a considerable body of judicial opinion,¹ but cannot be regarded as settled.² It was impliedly accepted by the legislature when it enacted the following provision in the Trade Disputes Act,³ recognising a trade dispute as a justification :

"An act done by a person in contemplation or furtherance of a trade dispute is not actionable on the ground only that it is an interference with the trade, business or employment of some other person, or with the right of some other person to dispose of his capital or his labour as he wills."

In *Conway v. Wade*,⁴ the defendant, a district delegate of a trade-union, in order to punish the plaintiff, a workman and member of the union, for not paying a fine, procured his discharge by his employers by telling them that if they did not discharge the plaintiff there would be trouble with other union men employed by them. In doing this, he acted only as a mischief-maker and without any authority of his union. The House of Lords held that there was no trade dispute and he was liable. It is hardly necessary to add that damage, *i.e.*, pecuniary damage or loss of trade, business or employment is essential in this class of action. So in a Nagpur case⁵ the High Court held that an action would not lie for an injunction to prevent defendants from dissuading people from accepting invitations to a funeral function proposed to be celebrated by the plaintiff. The resulting annoyance and worry would not be enough to furnish a cause of action. It would be otherwise if the methods of persuasion and picketing adopted by the defendants amounted to libel or trespass.

26. Remedy.—The remedy for the wrongs discussed above is an action for damages or for injunction.⁶ The damages are at large and will be determined not merely by the actual pecuniary loss but also by other

1. *Giblan v. National Amalgamated Labourers' Union*, (1903) 2 K. B. at p. 620, *per* Romer, L. J.; Cooley, Torts, Vol. II. pp. 589, 590; Burdick, Torts, pp. 324, 325; Erle, C. J.'s report, above, para. 18.

2. If such a cause of action exists the element of conspiracy was really unnecessary in *Quinn v. Leathem*, a view which was emphatically repudiated by Atkin, L. J. and Lord Dunedin; see above, paras. 21 and 22.

3. S. 3. In India, see Act XVI of 1926, S. 18.

4. (1909) A. C. 506. Here however the liability of the defendant in absence of a trade dispute was not denied and therefore was not the subject of decision.

5. *Dipchand v. Manakchand* I. L. R. 1939 Nag. 429; 1939 Nag. 154.

6. *Trollope v. London Building Trades' Association*, (1895) 72 L. T. 342; *National Sailors' and Firemen's Union v. Reed*, (1926) Ch. 536; *Exchange Telegraph Co. v. Gregory*, (1896) 1 Q. B. 147; *Goldson v. Goldman*, (1914) 2 Ch. 603. In the U.S.A. the remedy of injunction is often used against labour unions to prevent strikes, picketing, etc.; see Wigmore, Cases on Torts, Vol. II, pp. 373-404; Zechariah Chaffee, Cases on Equitable Relief against Torts, pp. 99, 100, 472; 42 L. Q. R. 164, 353; 45 L. Q. R. 19; U.S.L.R. (1932) p. 310.

circumstances relating to the conduct of the parties, like the defendant's motive.¹ In an action for procuring a breach of contract, the plaintiff need not prove actual or pecuniary damage and in any case he would be entitled to nominal damages for the violation of his legal right.²

1. *Pratt v. British Medical Association*, (1919) 1 K. B. 244, 281; *Said v. Butt*, (1920) 3 K. B. 497, 504, 505.

2. *Lumley v. Gye*, (1853) 2 E. & B. 216; *British Industrial Plastics Ltd. v. Ferguson*, (1938) 4 A. E. R. 504 (C.A.); as to the propriety of joining in the same suit a cause of action against the party breaking the contract, see *Jekisondas v. Ranchoddas*, (1916) 1 L. R. 41 Bom. 137, 140; 19 Bom. L. R. 12.

CHAPTER XII.

INJURIES TO MISCELLANEOUS RIGHTS.

1. In the preceding chapters injuries to various rights like those of personal security, property and reputation have been considered. These injuries have on account of their importance and for historical reasons obtained distinctive names, like assault, trespass, nuisance. It now remains to notice some nameless wrongs which are violations of other rights protected by law. These rights are (i) Patent, Copyright and Trade Mark, (ii) Right to an office or dignity, (iii) Right to the membership of a club, association or caste, (iv) Right of worship, (v) Right conferred by statute. There are other rights which have not yet been recognised but seem to be claiming recognition, *e.g.*, the rights to privacy and to emotional tranquillity. As already observed, the tendency of the growth of tort-law has been to recognise new rights and interests in response to changing needs and conditions.¹

2. **Patent, Copyright and Trade Mark.**—These are exclusive rights in respect of movable property, and are regarded as a species of incorporeal personal property,² just as franchises of ferry or market are a species of incorporeal real property.³ These rights are recognised by law on the principle of securing to every individual the fruits of his industry, labour or capital. Injuries to trade marks and trade names have been already discussed under the head of injurious falsehood.⁴

3. **Patent.**—A patent is an exclusive right or privilege granted by the Crown to make, use or sell an invention for a limited time, usually fourteen years. The law as to the grant of patent and the rights of a patentee are governed in England by the Patents and Designs Act, 1907,⁵ and in India by

1. Above, Chap. I, para. 27; see also Francis H. Bohlen, "Fifty years of Torts," 50 Har. L.R. 725-748, 1225-1248. For an interesting case in England where an action was allowed for the violation of the right to a married status, see *James v. Shackleton*, decided by Humphreys, J., at Leeds Assizes on 16th July, 1937; 84 L.J. 169. The plaintiff had obtained a decree *nisi* for divorce against her husband and a few days before the decree absolute was passed had become reconciled to him. Her solicitor had however obtained the decree absolute without her instructions and did not also notify her of the decree. She lived with her husband for four years and sued the solicitor for damages for his negligence resulting in her living with a man who was not her husband. It was held that her change of status as the result of which she had unwittingly committed immoral acts was sufficient damage to sustain the action and she was awarded £ 100.

2. Holdsworth, Vol. VII, pp. 529, 530; Pollock, Torts, pp. 246, 300.

3. Above, Chap. IV, para. 59; Chap. VI, para. 18.

4. Above, Chap. X, para. 5.

5. 7 Ed. 7, c. 29 as amended by P. & D. Act, 1919 (9 & 10 Geo. 5, c. 80).

an Act of the same name passed in 1911.¹ A patentee may sue for infringement of his patent and get damages as well as an injunction. Damages cannot be recovered against a person who was not aware or had no reasonable means of making himself aware of the existence of the patent; but an injunction can be obtained even against an innocent infringer.² In cases where the patentee is in the habit of licensing the use of his invention by other manufacturers for a royalty, the measure of damages against an infringer is the royalty which the infringer would have had to pay.³ Where the patentee is not in the habit of issuing licences but manufactures his own invention, the damages would be the loss of profits which he would have made, if he had himself manufactured and sold the articles manufactured and sold by the infringer.⁴ When any person claims to be a patentee and threatens any other person with proceedings for infringement of his patent, any person aggrieved thereby may sue him in a District Court for damages and injunction.⁵

4. **Copyright.**—Copyright may be defined as the exclusive right of multiplying copies of an original work of literature or art and includes also the right of performing a work in public.⁶ Formerly the right was incidental to the system of state regulation of printing in England. A book could be published only by a licence from the Crown and had to be registered with the "Stationers' Company" to whom the general supervision of printing had been entrusted.⁷ The question whether the common law protected this right apart from royal grant was doubtful.⁸ By an Act of Queen Anne's reign⁹ copyright in published works became a statutory right. As it arose only on publication of a work, copyright in unpublished works existed only under the common law till it was recognised by the Copyright Act of 1911.¹⁰ Under this Act, which is an Imperial Act applicable to the Dominions and extended to India by an Act of 1914,¹¹ a copyright subsists in every 'original' literary, dramatic, musical and artistic work.¹² The work must be 'original' in the sense that it originates from the author, and that it is not a copy of another's

1. Act II of 1911. As to the procedure for grant of patent, see Ss. 3-12. As to registration of designs, see Part II.

2. S. 30, (Indian Act).

3. *Penn v. Juck*, (1867) L.R. 5 Eq. 81; *British Motor Syndicate v. Taylor*, (1901) 1 Ch. 122.

4. *United Horse Shoe and Nail Co. v. Stewart*, (1883) 13 A.C. 401; *Watson Laidlaw Co. v. Pott*, (1914) 31 R.P.C. 104.

5. S. 35.

6. Copinger, Law of Copyright, p. 1. For a case of performing musical work in public, see *Mellor v. Australian Broadcasting Commission*, (1940) A.C. 491; *Ernest Turner Electrical Instruments Ltd. v. Performance Right Society Ltd.*, (1943) 1 A.E.R. 413 C.A.

7. Holdsworth, Vol. VI, pp. 364 to 379.

8. *Miller v. Taylor*, (1769) 4 Burr. 2303; *Donaldson v. Beckett*, (1774) 4 Burr. 2408.

9. (1709) 8 Anne, c. 19. The later Act was (1842) 5 & 6 Vict., c. 45.

10. 1 & 2 Geo. 5, c. 46.

11. Act III of 1914.

12. Ss. 3 (1) and 35.

work.¹ Not much originality is required to make a work original. Thus a copyright exists in a verbatim report of a speech,² a translation of a speech in a foreign language,³ reports of cases in a law journal,⁴ examination papers,⁵ selections or compilations from existing works.⁶ It has been held that private letters are comprised in the phrase "original literary work."⁷ Prior to the Act of 1911, an unauthorised publication of such unpublished letters was a wrong only under the common law and was restrained on the ground of its being a breach of trust or confidence.⁸ The receiver of the letters has the property in the material of the letters and can preserve or destroy them but their sender or author has been held to retain a proprietary right to prevent their publication to the world.⁹ A licence or right to publish may however be inferred from the circumstances as where a letter is sent to a newspaper, or where it had to be published for vindicating the publisher's character.¹⁰ Copyright includes the right to produce a work for sale, to publish a translation, to convert a novel into a dramatic work or *vice versa*, to make films for reproducing any literary or dramatic work,¹¹ to construct or exhibit architectural works of art.¹² The author of the work is the first owner of a copyright,¹³ which subsists during his life

1. *Per Peterson, J.*, in *University of London Press v. University Tutorial Press*, (1916) 2 Ch. 601, 608, 609; *Macmillan & Co. v. Cooper*, (1923) 1 L.R. 48 Bom. 308 (P.C.): 51 I.A. 109. There is no copyright in the title taken from an old book; *Dicks v. Yates*, (1880) 18 Ch. D. 76; or in a mere idea apart from the particular form or language in which it is conveyed; *Donoghue v. Allied Newspapers*, (1938) 1 Ch. 106; *Gopal Das v. Jagannath*, (1938) A.L.J. 390.

2. *Walter v. Lane*, (1900) A.C. 539. 3. *Byrne v. Statist Co.*, (1914) 1 K.B. 622.

4. *Jogesh Chandra v. Mohin Chandra*, (1914) 18 C.W.N. 1073.

5. *University of London Press v. University Tutorial Press*, (1916) 2 Ch. 601.

6. *British Broadcasting Co. v. Wireless League Publishing Co.*, (1926) 1 Ch. 433; *Ghaffur Baksh v. Jwala Prasad*, (1921) 1 L.R. 43 All. 412; 19 A.L.J. 180; *Macmillan & Co. v. Cooper*, (1923) 1 L.R. 48 Bom. 308 (P.C.): 51 I.A. 109; directories; *Kelly v. Morris*, (1866) L. R. 1 Eq. 697; *Kelly's Directories v. Gavin*, (1902) 1 Ch. 631; tradesmen's catalogues; *Collis v. Citer*, (1898) 78 L.T. 613; *Davis v. Benjamin*, (1906) 2 Ch. 491; railway guides; *Blacklock v. Pearson*, (1915) 2 Ch. 376; quotations of prices of stocks; *Exchange Telegraph Co. v. Gregory*, (1896) 1 Q.B. 147; tables of dates from Post Office guide inserted in a diary; *Frank Smythson Ltd. v. Cramp*, (1943) 1 Ch. 133 C.A. There is no copyright in an examination syllabus prepared by a person and given to a University; *Muhammad Abdul v. Ram Dayal*, (1916) 1 L.R. 38 All. 494; 14 A.L.J. 724.

7. *British Oxygen Co. v. Liquid Air, Ltd.*, (1925) 1 Ch. 383.

8. *Pope v. Curl*, (1741) 2 Atk. 342 (Pope's letters); *Gee v. Pritchard*, (1818) 2 Swanst. 402; *Perceval v. Phipps*, (1813) 2 V. & B. 19.

9. *Macmillan v. Dent*, (1907) 1 Ch. 107 (letters of Charles Lamb); *Phillip v. Pennell*, (1907) 2 Ch. 577.

10. *Perceval v. Phipps*, (1813) 2 V. & B. 19; *Labouchere v. Hess*, (1898) 77 L.T. 559. It has been suggested that the Government has the right on grounds of public policy to publish or withhold letters addressed to public officers; Copinger, Copyright, p. 40.

11. *Samuelson v. Producers' Distributing Co., Ltd.*, (1932) 1 Ch. 201.

12. S. 1 (2). See *Meikle v. Maufe*, (1941) 3 A.E.R. 144.

13. S. 5. The assignee can have the same remedy; *Ramiah Asari v. Chidambara*, (1920) 39 M.L.J. 341; 59 I.C. 221.

and a period of fifty years after his death.¹ He is entitled to assign his copyright and the assignee has the same right to sue for infringement of it as the owner.

5. Infringement of copyright.—Copyright is infringed when a person reproduces another's work² or produces a copy which is a colourable imitation of the original,³ or sells or distributes infringing copies.⁴ It is not necessary that the defendant should have an intention to infringe and therefore his innocence is no excuse.⁵

6. Action for infringement of copyright.—In an action for infringement, the plaintiff may ask for damages or an account of profits, or for injunction.⁶ He can also as owner of the infringing copies claim delivery of possession or damages for their conversion.⁷ Whether there is piracy of a copyright by a colourable imitation is a question of fact in each case.⁸ An abridgment has been held to be an infringement.⁹ There is no infringement in the following cases,¹⁰ viz., fair dealing with any work for private study, research, criticism, review or newspaper summary; making or publishing photographs, paintings or drawings or works of sculpture in a public place, or of any architectural work; publication in a collection for the use of schools, of extracts from published literary works provided not more than two extracts from the same author are published by the same publisher within five years and the source of the extracts is acknowledged; publication in a newspaper of a report of a public speech provided it is not prohibited by a conspicuous notice in writing at the place of the lecture. The Act extends protection to works published in other parts of the Empire and in foreign countries specified by His Majesty's Order in Council.¹¹

7. Right to an office or dignity.—In mediaeval England, offices were on account of their connection with the feudal system of landholding regarded as a species of incorporeal real property and protected by remedies

1. S. 3. The right to publish a translation of a work published in British India subsists for 10 years; S. 4 of the Indian Act. 2. S. 2 (1).

3. S. 35. For a case of imitation of sketches and cartoons, see *King Features Syndicate v. Kleeman Ltd.*, (1941) A.C. 417. 4. S. 2 (2).

5. *Performing Right Society v. U. D. C. of Bray*, (1930) A.C. 377. 6. S. 6.

7. S. 7. As to measure of damages, see *Ash v. Dickie*, (1936) Ch. 655; above Chap. V, para. 60. The remedies under Ss. 6 and 7 are cumulative; *Sutherland Publishing Co. v. Caxton Publishing Co.*, (1939) A.C. 173; *Ash v. Hutchins & Co.*, (1936) Ch. 489.

8. *Mohendra Chandra v. R.*, (1929) 33 C.W.N. 172; 1928 Cal. 359; *Mohini Mohan v. Sita Nuth*, (1930) 34 C.W.N. 540; 1931 Cal. 233.

9. *Dichens v. Lee*, (1844) 8 Jur. p. 184, per Knight-Bruce, V. C.; *Tinsley v. Lacy*, (1863) 1 H. & M. p. 754, per Page Wood, V.C.; *Macmillan & Co. v. Cooper*, (1925) I.L.R. 48 Bom. 308 (P.C.); 51 L.A. 109. 10. S. 2.

11. Ss. 29, 30. A foreign author can also apply to the customs officer to prevent import of infringing copies; Indian Act, S. 6.

appropriate to such property.¹ They disappeared with the old order of political ideas. At the present day an office is generally the creation of statute which would govern the rights and remedies of the person holding it. No suit will lie for disturbance of a mere title or dignity. In *Cowley v. Cowley*,² Earl Cowley sued to restrain his former wife, who had obtained a divorce from him, from continuing to use the title of Countess Cowley, but his action was dismissed on the ground that the matter was not within the cognisance of a Court of law and can only be tried before the peers. A suit for disturbance of an office is cognisable by civil courts³ but in India claims are often made under colour of this rule to vindicate a religious honour or dignity. Such a claim is not allowed unless the honour or dignity is appurtenant to an office in a temple or other religious institution.⁴

8. **Right to the membership of a club, association or caste.**—The right of a member of a club or other association to retain his membership and sue for wrongful expulsion is regarded as incidental to the right of property vested in such member.⁵ Therefore if a club or association has no property, he has no such right. But an expulsion may be actionable on other grounds as where it is accompanied by false and defamatory imputations or carried out by the use of physical force. In India, the membership of a caste among Hindus is regarded as a matter of status and an improper expulsion or excommunication is actionable in a civil court though the caste may have no property.⁶ It may also amount to actionable defamation,⁷ but is in itself an independent cause of action.⁸ A member of a club, caste or other association cannot complain if the decision to expel him was arrived at

1. Holdsworth, Vol. VII, p. 312.

2. (1901) A.C. 450, 456.

3. S. 9, C. P. C. As to religious offices, see *Krishnama v. Krishnaswami*, (1879) I.L.R. 2 Mad. 62; *Srinivasa v. Tiruvengada*, (1888) I.L.R. 11 Mad. 450; *Kasam Khan v. Kafu*, (1926) I.L.R. 50 Bom. 148; *Kaja Muhammad v. Mian Muhamud*, (1922) I.L.R. 4 Lah. 15 (P.C.). The office should be attached to an institution; *Chunnu Datt v. Babu Nandan*, (1910) I.L.R. 32 All. 527; *Sheik Umar v. Budan*, (1912) I.L.R. 37 Mad. 228; cf. *Ghelabhai v. Hargovan*, (1911) I.L.R. 36 Bom. 94; 13 Bom. L.R. 1171; *Bansi v. Kanhujiya*, (1921) I.L.R. 43 All. 159. See also *Purushottandas v. Bai Dahi*, I.L.R. 1940 Bom. 339; 1940 Bom. 205; above, Chap. X, para. 7.

4. *Andaniswami v. Totadaswami*, (1920) 23 Bom. L.R. 75; *Sri Vanamamalai v. R.E. Board*, 1935 Mad. 621; *Perianan v. Mahadevan*, 1935 Mad. 679; *Sri Emberumanar v. R. E. Board*, 1936 Mad. 973; but see *Debendra v. Satyacharan*, (1927) I.L.R. 54 Cal. 614.

5. *Rigby v. Connol*, (1880) 14 Ch. D. 482, 487, *per* Jessel, M.R. In the case of a proprietary club, the member's remedy is to sue the proprietor for breach of contract: *Baird v. Wells*, (1890) 44 Ch. D. 661; *Lyttleton v. Blackburne*, (1875) 45 L.J. Ch. 219.

6. *Jagannath v. Akali Dassia*, (1893) I.L.R. 21 Cal. 463, 470; *Nagindas v. Somnath*, (1931) I.L.R. 56 Bom. 242.

7. *Coopoozami v. Duraisami*, (1902) I.L.R. 33 Mad. 67; *Gobind Das v. Bishambar Das*, (1917) I.L.R. 39 All. 561 (P.C.).

8. *Narayana Sah v. Kanakamma*, (1931) I.L.R. 55 Mad. 727; 62 M.L.J. 608; cf. *Nuthu Velji v. Keshawji*, (1901) I.L.R. 26 Bom. 174.

bona fide and in conformity with natural justice and the rules of the club or caste.¹

9. **Right of worship.**—The right of worship is a civil right and an action lies for its disturbance.² In India it includes the right to take religious processions through public streets, subject to the right of the public to use them.³

10. **Right conferred by statute.**—When a right is the creation of statute, the extent of the right as well as the nature of the remedy for its violation would depend on the terms of the statute. The general rule is that laid down in *Ashby v. White*,⁴ that an action lies against a person who disturbs a legal right. Accordingly the defendants were held liable in that case for preventing the plaintiff from exercising his statutory right to vote in a Parliamentary election. If the plaintiff had no right of vote, he could not complain, even though the defendant, a returning officer, exceeded his duty in rejecting the plaintiff's vote.⁵

11. **Right to privacy.**—The phrase 'right to privacy' is used in the Indian case-law to refer to the right which an owner of a house may have under local custom to seclusion of his inner apartments from the view of his neighbour.⁶ It has been used in recent years in the United States⁷ and afterwards also in England⁸ in the sense of the right to freedom from unauthorised publication of one's likeness, or personal or private affairs.

1. Below, Chap. XVIII, para. 16; *MacLean v. The Workers' Union*, (1929) 1 Ch. 602.

2. *Waman Balwant v. Balu Harsher*, (1910) I.L.R. 44 Bom. 410; *Jaffar Hussain v. Krishnan Servai*, (1929) I.L.R. 53 Mad. 761; 58 M.L.J. 703; *Khalil v. Israel*, (1917) 2 Pat. L.J. 108; 37 I.C. 302; *Ram Chandra v. Ali Mahomed*, (1918) I.L.R. 35 All. 197. As to disturbance by unauthorised entry of persons whose entry causes desecration of the shrine, see *Anandrao Bhikaji v. Shankar Daji*, (1883) I.L.R. 7 Bom. 323. It has been suggested that the pollution by such entry may amount to trespass to the person; *Saklat v. Bella*, (1925) I.L.R. 3 Rang 582 (P.C.); 53 I.A. 42; *Shamas-ud-din v. Abdul Aziz*, 1932 Lah. 423, (misuse of a village graveyard).

3. *Andi v. Muthuveera*, (1915) 29 M.L.J. 91; *Mansur v. Muhammad*, (1924) I.L.R. 47 All. 151 (P.C.); *Muhammad Jalil v. Ram Nath*, (1930) I.L.R. 53 All. 434; *Martin & Co. v. Syed*, (1943) 48 C.W.N. 307 P.C. Above, Chap. VI, para. 10.

4. (1702) 2 Ld. Raym. 938; 1 Sm. L.C. 253; above, Chap. I, para. 12; *Pickering v. James*, (1873) L.R. 8 C.P. 489; cf. *Toser v. Child*, (1856) 7 E. & B. 377 (defendant held not liable as he did not act maliciously); *Draviam v. Cruz Fernandes*, (1915) 29 M.L.J. 704. A voter has no right to ask a court to compel a member of Parliament to present a petition on his behalf; *Chaffers v. Goldsmid*, (1894) 1 Q.B. 186. See also *Davis v. Black*, (1841) 1 Q.B. 900 (whether an action lies against a clergyman for refusing to perform a marriage).

5. *Pryce v. Bleker*, (1847) 4 C.B. 866; *Ram Ugrak Singh v. Benares Hindu University*, (1924) I.L.R. 47 All. 434 (no right of a student to sue University to be placed in the list of successful candidates).

6. Above, Chap. VI, para. 18.

7. See below, note 1.

8. Winfield, 47 L.Q.R. 23. The right is said to be recognised in France and Switzerland; H.C. Gutteridge and F.P. Walton, 47 L.Q.R. 203.

The question has been brought into prominence on account of the aggressive activities of photographers, pressmen, and commercial adventurers who seek sensation and profit by such methods.

12. Right to privacy in the United States.—The theory that an action would lie on the mere ground of an invasion of a right to privacy or as it has been said, 'a right to be let alone' was first propounded in 1890 by two American lawyers in the pages of a legal journal.¹ The right was stated to be to the protection of one's feelings and emotions and to freedom from annoyance and mental discomfort. It was suggested that this right to emotional tranquillity deserved recognition as much as the rights to the security of one's person, property and reputation. In this broad form this right has not been recognised by the courts.² But certain forms of invasion of this right have been treated as actionable. One of them is the unauthorised publication of a person's photograph or likeness. This is a very common form of wrongdoing by people who desire to exploit another's likeness for commercial purposes.³ Another category of cases is where courts have allowed a right of action for mental distress caused by collecting agencies resorting to certain devices for collecting debts, such as sending letters in envelopes conspicuously proclaiming the failure of the plaintiff to pay his just debts, adopting violent and threatening language, etc.⁴

Illustrations.—In a New York case,⁵ the plaintiff, a young woman, complained that the defendants, flour manufacturers and sellers, printed and circulated without her knowledge or consent 25,000 portraits of her likeness with the following words below the portraits, "Flour of the Family," "Franklin Mills Flour." The Supreme Court of New York held that there was no libel and denied a right of action on the ground of an invasion of a right to privacy. The State legislature, however, enacted a law the next year conferring a right of action in such cases.⁶

In a case in Georgia,⁷ an Insurance Company published in a newspaper the plaintiff's photograph by the side of an ill-dressed sickly looking person, a legend above the plaintiff's picture reading "The man who did", and one above that of the other person, "The man who did not". In that way it was sought to contrast the favourable position

1. Messrs. Samuel D. Warren and Louis D. Brandeis, *Selected Essays on Torts*, p. 122; Roscoe Pound, *ibid.*, p. 106; Cooley, *Torts*, Vol. I, p. 360; Burdick, *Torts*, p. 25; Wigmore, *Select Cases on Torts*, Vol. I, p. 739; 43 Har. L.R. 297.

2. Prof. Francis H. Bohlen, 50 Har. L.R. 731. 3. See below, notes 5 & 7.

4. 50 Har. L.R. 732; 49 Har. L.R. 1060-1064. "Derogatory truth may not always be proclaimed from the house-tops;" F.H. Bohlen, 50 Har. L.R. 732. This is a flank attack on the doctrine of truth being a justification in the law of defamation. Other forms of invasion of the right of privacy recognised in some of the states are the unauthorised dissection or disinterment of a corpse causing mental distress to the relatives of the deceased, the publication of the photograph of a deceased relation; 49 Har. L.R. 1064-1066; wire-tapping or intercepting and recording messages on a telephone; 35 Law Notes 133. See also 44 Har. L.R. 842.

5. *Roberson v. The Rochester Folding Box Co.*, (1902) 171 N.Y. 538; Kenny, *Cases on Torts*, p. 364. As to this case, see 35 Law Notes, pp. 27, 23. 6. 47 L.Q.R. p. 35

7. *Pavesich v. New England Mutual Life Insurance Co.*, (1905) 122 Ga. 190; 69 L.R.A. 101.

of the plaintiff who had insured with the company and that of the other person who had not and found his mistake. It was held that the publication tended to bring the plaintiff into ridicule and was an invasion of his right of privacy. In these two cases it would amount also to actionable defamation.

In a California case¹, the action could rest only on the former ground. The plaintiff had renounced a life of shame and had been acquitted after a trial for murder, married and became an exemplary wife. Seven years later, the defendants without permission released a motion picture based on the true story of the plaintiff's life, as found in the Court records, advertising it as such and using the plaintiff's maiden name. It was held that the plaintiff could sue for a violation of her right of privacy.

In a Kentucky case² a creditor put up a huge placard in the show window of his automobile garage stating "Dr. W. R. Morgan owes an account here of \$49.67. And if promises would pay an account, this account would have been settled long ago." Held that there was an invasion of the right of privacy and the truth of the fact stated was no defence to the action.

13. Right to privacy in England.—The trend of English case-law³ is, however, against any right of action for mere annoyance or injury to feelings independently of the recognised heads of actionable injury already discussed. For instance, no action lies for insult by words or gestures unless they amount to assault or defamation.⁴ An action for the unauthorised use of the name of a person or his property does not lie unless it is likely to cause loss of business or trade.⁵ In one case⁶ the right to privacy of one's property arose for decision and was negatived. The promoters of a dog show assigned the sole photographic rights at the show to the plaintiff. He complained that the defendant, a visitor at the show, took photographs of the dogs without the authority of the promoters and published them in illustrated papers. He sued for an injunction to restrain the defendant from making any further use of the photos. His suit was dismissed on the ground that the law did not recognise an exclusive right to take photographs of one's property. If, however, the defendant was admitted into the enclosure on the terms that he should not take photos without the plaintiff's authority, he could be restrained from committing a breach of contract. An

1. *Melvin v. Reid*, (1931) cited in 44 Har. L.R. 1146. Some States have restricted the defence of justification in a civil action as in a criminal prosecution for libel; 43 Har. L.R. 127. See also 49 Har. L.R. 1062.

2. *Brents v. Morgan*, (1927) 221 Ky. 765; 299 S.W. 967; 49 Har. L.R. 1060.

3. *Corelli v. Wu'li*, (1905) 22 T. L. R. 532; above, p. 265; see also *per* Greer, L. J., in *Tolley v. Fry & Sons*, (1930) 1 K.B. at p. 467.

4. Above, Chap. VII, para. 2.

5. Above, Chap. X, para. 8.

6. *Sports and General Press Agency, Ltd. v. "Our Dogs" Publishing Co., Ltd.*, (1916) K.B. 880; (1917) 2 K.B. 125. See also *Mills v. Fox Films Co.*, (1923) 58 L. Jour. 511 (photographs taken from an aeroplane). In an Australian case (54 L. Q. R. 319) the defendant erected beside the plaintiff's race course a platform from which he allowed a commercial company to broadcast a description of the racing. The broadcast was so successfully carried out that attendances at the race-course fell off and loss resulted to the plaintiff. The action was disallowed by the H.C. and the Privy Council refused leave to appeal.

invasion of the privacy of a person or his property may however afford independent causes of action. The publication of a person's portrait or caricature may be defamatory as in the case of *Tolley v. Fry & Sons*.¹ Invasion of the privacy and seclusion of a man's premises by loitering about them may be a trespass² or nuisance.³ Publication of a person's private letters or works not intended by him to be published may be restrained as a breach of confidence or an infringement of the right of property.⁴ Unauthorised publication of a photograph may amount to a breach of contract, as where a photographer employed to take a certain number of copies took more and sold them.⁵

14. Right to emotional tranquillity.—The law in England and in India has not so far recognised emotional disturbance or distress as actionable *per se*.⁶ It, however, allows actions for illness or bodily harm supervening on it and its tendency is to widen the sphere of such actions.⁷ The position in the United States has already been referred to.⁸

1. (1931) A. C. 333; above, Chap. VII, para. 20.

2. *Harrison v. Duke of Rutland*, (1893) 1 Q. B. 142; *Hickman v. Maisey*, (1900) 1 Q. B. 752.

3. *Lyons v. Wilkins*, (1899) 1 Ch. 255.

4. Above, para. 4; see also *Prince Albert v. Strange*, (1849) 2 De. G. & Sm. 652, 693; 1 M. & G. 25 (unauthorised publication of etchings made by Prince Albert and Queen Victoria); *Abernethy v. Hutchinson*, (1825) 3 L. J. Ch. 209 (publication of the lectures of a doctor). The same principle applies to piracy of trade secrets; *Yovatt v. Winyard*, (1820) 1 J. & W. 394; *Morison v. Moat*, (1851) 8 Hare 241.

5. *Tuck v. Priest*, (1887) 10 Q. B. D. 629; *Pollard v. Photographic Co.*, (1888) 40 Ch. D. 345.

6. Above, Chap. II, para. 4.

7. Above, Chap. II, para. 6.

8. Above, para. 12.

CHAPTER XIII.

INTENTIONAL WRONGDOING.

1. Principles of liability.—In the preceding chapters, torts or injuries to rights of various kinds have been considered. It is now necessary to discuss the principles of liability applicable to them. These principles may be discussed under the following five heads: (a) Intentional wrongdoing, (b) Negligence, (c) Absolute liability, (d) Vicarious liability, (e) Breach of statutory duty.

2. Intentional wrongdoing.—The word ‘intention’ is used in the sense of a design to produce the damage complained of. It implies an antecedent knowledge of the injurious consequence and a desire to produce it. When a person commits a tort with a mental condition of this kind his liability is clear and does not need any discussion. In his case the question whether the consequence is direct or remote does not arise, as a consequence which is intended is not remote in law.¹ The question will, however, be material to determine the liability for an unintended consequence of intentional wrongdoing. For instance the defence of contributory negligence may be open to the wrongdoer in such a case.²

3. Intention as a condition of liability.—Intention is not as a rule an essential condition of liability for tort. The cases where it is required are rather exceptional, e.g., assault, deceit, defamation in cases where a defence of privilege or fair comment is available, malicious prosecution, injurious falsehood, interference with trade or contractual relations, conspiracy. But it is unnecessary in the case of large and important categories of wrongs, e.g., injuries to person or property, nuisance, defamation in cases other than those mentioned above, infringement of patent, copyright, or trade mark. Therefore in a large class of cases, absence of intention or *bona fide* mistake is not a valid excuse.³ This feature of the law of torts was recognised long ago. “In all civil acts, the law doth not so much regard the intent of the actor, as the loss and damage of the party suffering.”⁴ On the other hand the object of the law of crimes is punishment and not compensation, and therefore a guilty intent is generally a condition of criminal responsibility. The theory of the common law was

1. *Per* Lord Lindley in *Quinn v. Leatham*, (1901) A.C. 495, 537.

2. As to the defence in cases of recklessness, see Restatement, II, §§ 282, 482. See *Banwari Lal v. Municipal Board, Lucknow*, 17 Luck. 98 : 1941 Oudh 572 (plaintiff stopping building because of empty threat of Municipal Board, too remote result).

3. Below, Chapter. XVIII, para. 3.

4. Sir Thomas Raymond, C.J. in *Lambert v. Bessey*, (1681) T. Raym. 422, 423.

expressed long ago in the maxim,¹ *actus non facit reum nisi mens sit rea*, the act itself creates no guilt in the absence of a guilty mind. But this rule is subject to important qualifications even in the criminal law. For instance, a person who causes the death of another not by design but by reckless conduct, *e.g.*, shooting or rash driving in a crowded place, may be guilty of murder or manslaughter. In such cases adherence to the above maxim is possible only by presuming intent as a matter of law from reckless conduct. Hence we have the well-known rule that "a man is presumed to intend the natural and necessary consequences of his acts."² The process of extending criminal responsibility to cases³ where actual intent is absent has gone so far that the maxim became out of date long ago. In the law of torts there is no need for a doctrine of presumed or constructive intent, as a guilty intent is not a condition of liability.

4. **Intention as a factor in creating liability.**—There is high authority for formulating a general rule that intentional harm is actionable unless there is a just cause or excuse. It has the support of a dictum of Lord Bowen⁴ and has been advocated by eminent writers like Sir Frederick Pollock.⁵ The difficulties in accepting a similar rule suggested by the same learned judge in the *Mogul* case,⁶ with special reference to injury to property or trade, have already been noticed.⁷ The same criticism applies to the wider rule. In England slander is not actionable without proof of special damage though it may cause damage to reputation. In the case of malicious prosecution the plaintiff does not succeed merely on proof of intentional harm but is required to prove absence of reasonable cause. If these cases have to be regarded as instances of just cause or excuse, the rule is incomplete without an enumeration of the rights which fall within the sphere of justification. If that has to be done, the rule does not take us much farther than the ordinary rule that in every case the plaintiff must establish a violation of some legal right of his or a breach of legal duty of the defend-

1. Stephen, *History of Criminal Law*, Vol. II, p. 94; P. & M., Vol. II, p. 476; Holdsworth, Vol. III, p. 374.

2. *R. v. Harvey*, (1823) 2 B. & C. 257, 364, *per* Bayley, J; Pollock, *Torts*, p. 26.

3. *E.g.*, *Parker v. Alder*, (1899) 1 Q.B. 20 (conviction of accused for selling milk adulterated without his knowledge); *Cotterill v. Penn*, (1936) 1 K.B. 53 (offence under Larceny Act). The I.P.C. has no such general rule but defines the state of mind or conduct required in each case. As to vicarious criminal responsibility, see below, Chap. XVI, para. 15.

4. *Skinner & Co v. Shew & Co*, (1893) 1 Ch. 413, 422: The dictum was adopted by Holmes, J., in the Supreme Court of the U.S.A., in *Aikens v. Wisconsin*, (1901) 195 U.S. 199, 204.

5. *Torts*, pp. 17, 18; see also C. K. Allen, 40 L.Q.R. pp. 164, 174; H.C. Gutteridge, 47 L.Q.R. at p. 208; W.A. Seavey, (1942) 56 Har. L.R. 72, 84. Dr. Winfield is in favour of an even wider rule as to all harm, intentional or otherwise; *Law of Tort*, pp. 15-21.

6. (1887) 23 Q.B.D. at p. 613.

7. Above, Chap. XI, para. 24.

ant.¹ It may be observed, however, that the rule is appropriate to a large class of wrongs, *e.g.*, physical injury to person or property.² The theory suggested by the late Sir John Salmond perhaps went too far in the other direction, *viz.*, that the law of torts like the criminal law consists of specific rules prohibiting certain kinds of harmful activity and a person who cannot show that the wrong he complains of falls in one of the categories recognised by law has no remedy.³ The objection to this theory which has been described as the 'pigeon-hole' theory⁴ is that it takes too rigid and static a view of this branch of law. Even in earlier times when forms of action were in force, this rigid view did not prevail. A judge of the eighteenth century observed, "Torts are infinitely various, not limited or confined."⁵ The remedy of action on the case was from time to time extended to meet new situations and redress new types of injuries, *e.g.*, action on the case of deceit,⁶ of malicious prosecution,⁷ action for inducing a wife to leave her husband,⁸ for procuring a breach of contract,⁹ for conspiracy.¹⁰

5. **Intentional omission.**—The principle that the plaintiff must show a violation of right or duty receives striking confirmation when the harm complained of is the result of an intentional omission and not a positive act. "No action will lie against a spiteful man, who seeing another running into a position of danger merely omits the warning."¹¹ A person who can, by giving information to another about to engage in a commercial undertaking, avert loss to the latter is not liable for wilfully omitting to do so; if, however, he makes a wilfully false statement and causes damage he is liable for deceit.¹² In these cases wilful inaction is a breach of a moral but not of any legal obligation. But in some situations a legal obligation to act in aid of another may arise. A nurse or care-taker of a child who deliberately

1. *Rogers v. Rajendro Dutt*, (1860) 8 M.L.A. 103; *Grant v. Australian Knitting Mills* (1936) A.C. at p. 103, *per* Lord Wright; above, Chap. I, para. 27.

2. The German Civil Code confines the rule to such cases; in others it qualifies the rule by enacting that damage wilfully caused in a manner *contra bonos mores* is actionable; Schuster, German Civil Law, p. 338. The French Civil Code however enacts the broad rule that wilful or negligent harm is actionable; Art. 1383.

3. Torts (7th ed.), p. 9; this opinion is not shared by Dr. Stallybrass, (9th ed.), pp. 17-19.

4. 47 L.Q.R. at p. 206.

5. *Per* Pratt, C.J., in *Chapman v. Pickersgill*, (1762) 2 Wills. at p. 146.

6. *Pasley v. Freeman*, (1789) 3 T.R. 51; above, Chap. IX, para. 1.

7. *Saville v. Roberts*, (1699) 1 Ld. Raym. 374; above, Chap. VIII, para. 3.

8. *Winsmore v. Greenbank*, (1745) Willes. 577; above, Chap. III, para. 4.

9. *Lumley v. Gye*, (1853) 2 E. & B. 216; above, Chap. XI, para. 2.

10. *Quinn v. Leatham*, (1901) A.C. 495; above, Chap. XI, para. 16.

11. *Per* Willes, J., in *Gautret v. Egerton*, (1867) L.R. 2 C.P. 371; see Bohlen, Studies, p. 291.

12. Above, Chap. IX, para. 5.

allows the child to get into a position of danger and sustain injury commits not merely a tort but a crime. An agent or legal adviser is liable if he deliberately or even carelessly omits to give his principal or client necessary information and advice. A vendor of a dangerous article is bound to warn the buyer of any hidden danger in it. A common carrier is bound to receive goods offered for carriage and is liable if he declines to do so.¹ These and other cases where a person has a positive duty to act fall broadly under two categories,² viz., (a) where he has already by active conduct created a position of danger,³ (b) where he has assumed or undertaken such a duty. In other cases wilful omission is not as a rule actionable wrong. In other words, the law generally enjoins abstention from injurious acts, but not active benevolence.⁴ Reformers like Bentham⁵ have advocated a different rule which would be in conformity with codes of ethics, but this is another instance where law and morals part company on account of the practical difficulties in enforcing a general duty to act in aid of another.⁶

6. Intention and motive.—These words are often used interchangeably in popular usage but the distinction between them is important in the law of torts as it is in the law of crimes. Motive has been described as an ulterior intent.⁷ A publishes a defamatory letter about B, his servant, to C. A's intent is to defame B but his motive may be to inform C, an intending employer of B, about B's character and prevent C employing B. Here, in spite of a libellous intent, a good motive would render A's act lawful. Sometimes the position may be the reverse.⁸ A steals a loaf of bread from B's bakery. A is liable for theft as well as for the civil wrong of trespass, though A's motive was not to cause loss to B but to feed A's starving child.

7. Malice.—A bad or improper motive is described in law by the term 'malice', i.e., malice in fact or express malice. The phrase 'malice in law'

1. Below, Chap. XV, para 6.

2. For a collection of cases on omission, see Winfield, 42 L. Q. R. 200; Otto Kirchheimer, (1942) 55 Har. L.R. 615; Restatement II, Topic 7, § 314 etc.

3. Cf. The duty of the vessel colliding with another to render help to the other under the Merchant Shipping Act, 1894, s. 422; *The San Onofre*, (1922) P. 243.

4. This was also the Roman law; Salkowski, Roman Private Law, p. 515; Lex Aquilia, Dig. IX, 2, 9, 27.

5. Specimen of a Penal Code, Bentham's Works, Vol I, p. 164. See also Ames, Selected Essays on Torts, p. 16. It is noteworthy that an ancient Hindu law-giver, Gautama, said to be of the 6th century B.C., prescribed a penalty for deliberate inaction as well as actively causing injury; Sacred Books of the East, Ch. XXI, sutra 19. The law is nowadays tending to restrict the sphere of permissible inaction; e.g., the duty of persons to act in aid of public officers under ss. 42-44, CrI. P.C.; see also ss. 154, 174, 187, 202, I.P.C.

6. Above, Chap. I, para. 19.

7. Salmond, Jurisprudence, p. 397.

8. Above, Chap. IX, para. 12.

has no reference to any state of mind and is nothing short of a perversion of terminology. It came into vogue in actions of defamation under circumstances already explained,¹ and has been a source of confusion in law. There is no reason why it should not be abandoned and malice confined to the sense of a bad motive. In that sense malice is wider than malice in the popular sense of ill will or spite.

8. Malice as a condition of liability.—As a general rule, a bad motive is not an essential condition of liability for a civil wrong.² The cases where it is essential are exceptional, *e.g.*, malicious prosecution, defamation in cases where the defences of privilege and fair comment are available, conspiracy.

9. Malice as a factor in creating liability.—In *Allen v. Flood*,³ the House of Lords propounded the rule that an act lawful in itself is not converted by a malicious or bad motive into an actionable wrong. This rule in spite of its apparent generality has only a limited application, and has therefore been criticised as having been stated in too broad and uncompromising a form.⁴ A similar doctrine with special reference to use of property, enunciated in *Bradford Corporation v. Pickles*,⁵ has already been considered. In the first place, the doctrine in *Allen v. Flood*, is not of universal application, as malice is an essential ingredient in certain wrongs like malicious prosecution and conspiracy. Secondly, the doctrine applies only to an act 'lawful in itself'—a phrase which is vague and requires explanation. It applies to those acts which are done in the exercise of what may be called 'absolute rights,' *e.g.*, the right to erect a building on one's land even though it obstructs light or air to the new house of a neighbour, to dig in one's land though underground water not flowing in a defined course to adjacent property is intercepted, to work or not to work under another, to employ or not to employ another, to trade or not to trade, to have business dealings or not to have them with another. But the rule has no application to acts whose legality is determined by a proper motive. For instance, causing noise or discomfort to a neighbour in the ordinary course of enjoying one's property is not actionable, but it is otherwise if the motive was only to annoy the neighbour.

10. Intention and volition.—Intention in the usual sense of design includes and implies the presence of volition, or the capacity to exercise

1. Above, Chap. VII, para. 33.

2. *Allen v. Flood*, (1898) A.C. at p. 92; Cooley, Torts, Vol. II, Chap. XXII.

3. (1898) A.C. 1; above, Chap. XI, para. 15; a similar rule was laid down by Parke, B., in *Stevenson v. Newnham*, (1853) 13 C.B. 285, where a distress for rent was held not to be illegal though it was malicious; "an act which does not amount to a legal injury cannot be actionable because it is done with a bad intent."

4. Ames, Selected Essays on Torts, p. 150; C. K. Allen, 40 L.Q.R. p. 164; Wigmore, Cases on Torts, Vol. II, 369 at p. 370.

5. (1895) A.C. 587; Chap. VI, para. 26.

one's will to do or not to do an act. It is sometimes used as synonymous with volition, as when it is said that a child or a lunatic can have no intention to injure. The opinion of text-writers is on the whole in favour of the view that volition is an essential condition of liability in the law of torts as it is in the law of crimes.¹ In England the view of early authorities was however different. They held, for instance, that a lunatic could be sued for a trespass.² The question of the liability of lunatics and children is devoid of any modern English authority. In the United States they have been held liable on grounds of justice and policy.³

1. Pollock, Torts, pp. 48, 49; Bohlen, Studies, pp. 543-547; *contra*, Cooley, Torts Vol. I, p. 171.

2. *Weaver v. Ward*, (1616) Hobart 134; for other references, see Pollock, Torts pp. 146, 147; above, Chap. II, para. 3, p. 36, f. n. 4.

3. Below, Chap. XIX, paras. 19 and 20.

CHAPTER XIV.

NEGLIGENCE.

1. **Negligence.**—Negligence implies absence of intention to cause the harm complained of.¹ It may be defined² as unreasonable conduct, *i.e.*, conduct which a reasonable man would avoid on the ground that it involves undue risk of harm to another. Such conduct when followed by harm to the latter gives rise to liability for negligence. Merely unreasonable conduct without damage is not actionable though it may be a punishable offence.³

2. **Negligence is conduct, not a state of mind.**—The contrary view was held by Austin, the well-known jurist and philosopher, but is not accepted by modern authorities.⁴ According to him, negligence is a faulty mental condition which is penalised by the award of damages. He proceeded to distinguish between different states of mind, *viz.*, rashness, heedlessness and negligence. These distinctions have no place in the modern law of torts which takes note only of the external conduct of the wrongdoer and tests it by the objective standard of the reasonable man's care.⁵ While the standard of care is objective and impersonal it is for the judge or jury to say what in each case the party concerned should as a reasonable man have contemplated or foreseen. As there is room for diversity of opinion between one judge or jury and another, the actual application of the standard of care may for that reason be considered to have a subjective element.⁶

3. **Standard of care.**—The law imposes on all persons the duty to exercise the care, skill and foresight of an average person of prudence. Therefore on the one hand a person cannot be made liable on the ground that he failed to take extraordinary care; and on the other it is no defence for a person whose conduct falls short of that standard that he acted to the best of his judgment and ability. This principle was implicit in older authorities, but was definitely formulated by Tindal, C. J., in *Vaughan v. Menlove*.⁷ The defendant kept a hayrick near the boundary of his premises. He was

1. The phrase 'wilful neglect' is a corruption of 'gross negligence'; for instances of its use, see *Ratcliffe v. Barnard*, (1870) L.R. 6 Ch 654; *Dixon v. Mickleston*, (1872) L.R. 8 Ch. 155; *R. v. Senior*, (1899) 1 Q.B. 283; see also the decisions under the Indian Railways Act, s. 72; *e.g.*, *Tamboli v. G.I.P. Ry. Co.*, (1927) L.L.R. 52 Bom. 169 (P.C.).

2. For definitions of the word, see Beven, *Negligence*, Vol. I, p. 2; Terry, 29 Har. L.R., p. 40. 3. *E.g.*, I.P.C., s. 336; *Kingman v. Seager*, (1938) 1 K.B. 397.

4. Holmes, *Common Law*, p. 81; "Austin's theory was that of a criminalist."

5. "The external standards of prudence or of the reasonable man are not new. They may be traced through our mediaeval sages and the canonists to the classical Roman lawyers, back to the Greek philosophers, especially the Stoics, and ultimately to Aristotle"; Sir F. Pollock, 44 Har. L.R. 695. See also Dr. Winfield, 45 Har. L.R. 125.

6. *Glasgow Corporation v. Muir*. (1943) 2 A.E.R. 44, 50 (H.L.), per Lord Macmillan.

7. (1837) 3 Bing. N.C. 468.

warned that it was likely to catch fire but said he would chance it. Owing to spontaneous ignition, the hayrick caught fire which spread to the plaintiff's cottages. The defendant contended that he acted honestly and to the best of his judgment in keeping the hay. In holding him liable, Tindal, C.J., observed that the standard of care was that of a man of ordinary prudence :

"Instead of saying that the liability for negligence should be co-extensive with the judgment of each individual, which would be as variable as the length of the foot of each individual, we ought rather to adhere to the rule which requires in all cases a regard to caution such as a man of ordinary prudence would observe."

Since then the reasonable man's care has been the accepted formula in actions for negligence. In *Blyth v. Birmingham Waterworks Co.*¹ Baron Alderson adopted it and defined negligence as the omission which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which he would not do. The defendants, a water company, had laid their mains and pipes according to law and the directions contained in an Act of Parliament. On account of an unusually severe frost the valves in the mains became incrustated with ice and water escaped and flooded the plaintiff's house. The defendants were held not liable.

4. **Degrees of care.**—By adopting a uniform standard of care English courts departed from the Roman law which recognised distinctions between different degrees of care.² A gratuitous bailee was bound only to show slight care and was liable only for *culpa lata* or gross negligence. On the other hand a bailee for hire was bound to show a higher degree of care, viz., that of a diligent householder, and liable for *culpa levis* or slight negligence. These distinctions were borrowed by Bracton in his treatise and by Holt, C.J., in his judgment in the well-known case of *Coggs v. Bernard*.³ But they were really foreign to the English law and have disappeared from it.⁴ The phrase 'gross negligence' has however persisted in legal usage. It has been said that "it is the same thing as negligence with the addition of a vituperative epithet."⁵

5. **Application of the standard of care.**—The decision of the question of negligence is arrived at by applying the abstract standard of the reasonable man's care to the facts of different cases. Though the standard is uniform, the degree of care required in different situations will obviously

1. (1856) 11 Ex. 781. Cf. *Manchester Corporation v. Markland*, (1936) A C. 360.

2. W. W. Buckland, *Roman Private Law*, p. 289.

3. (1703) 2 Ld. Raym. 909 ; 1 Sm. L. C. 175 ; below, para. 61.

4. The Restatement excludes reckless conduct from the scope of negligence ; one of the points of distinction is that there can be no plea of contributory negligence in the former case ; Vol. II, §§ 282, 432.

5. *Per* Rolfe, B., (Lord Cranworth), in *Wilson v. Brett*, (1843) 11 M. & W. at p. 115.

vary. A driver of a motor car requires greater skill and care than a driver of a carriage and horse.¹ A surgeon is expected to show the care and skill not of an ordinary layman but of a member of his class.² Where skilled work is undertaken want of skill is negligence in law; *imperitia culpae adnumeratur*.³

6. Action for negligence.—While negligence is usually understood in the sense of unreasonable conduct it is used in the phrase 'action for negligence' to mean the injury resulting from such conduct. In the latter context it is a technical term signifying the ingredients that constitute actionable negligence. They may be stated as follows in the form of the points which the plaintiff has to prove in an action for negligence: (a) that the defendant was under a duty to take reasonable care towards the plaintiff to avoid the damage complained of⁴; (b) that there was a breach of duty on the part of the defendant; (c) that the breach of duty was the direct cause of the damage complained of.

7. Actionable negligence.—In the sense above indicated, the word 'negligence' signifies the tort of actionable negligence and the elements that constitute the tort.⁵ "In strict legal analysis, negligence properly connotes the complex concept of duty, breach and damage thereby suffered by the person to whom the duty is owing".⁶ In an article in the Law Quarterly Review,⁷ Dr. Winfield has examined the use of the word in the above sense and described it as an independent tort by way of distinguishing it from negligence as a mode of liability for other torts. The importance of the distinction is that in actions for negligence the plaintiff must plead and prove the aforesaid ingredients, *viz.*, duty, breach

1. *McCrone v. Riding*, (1938) 1 A.E.R. 157 (want of experience no excuse in prosecution under Road Traffic Act).

2. See *Mahon v. Osborne*, (1939) 2 K.B. 14 (surgeon leaving swab inside abdomen after operation); *Sabapathi v. Huntley*, 47 L.W. 409; 1938 P.C. 91 (surgeon failing to advise X-ray examination immediately after accident, not *per se* negligence). A jeweller piercing the ear is not expected to behave as a surgeon; *Philips v. William Whitely, Ltd.*, (1938) 1 A.E.R. 566. As to when a doctor is guilty of criminal negligence, see *Akerley v. R.*, (1943) A.C. 255; 1943 P.C. 72.

3. Inst. 4, 3, 7, *cf.* Fitzherbert, N.B. 94 D; "It is the duty of every artificer to exercise his art right and truly, as he ought."

4. Or, as Dr. Buckland would prefer to put it, duty not to cause damage to the plaintiff by failure to use reasonable care; 51 L.Q.R. 641.

5. This form of statement does not however militate against the argument in favour of the classification of negligence as a mode of liability for bodily harm and other injuries; above, Chap. II, para. 2.

6. *Per* Lord Wright in *Lochelly Iron & Coal Co. v. M'Mullan*, (1934) A. C. at p. 25; *per* Lord Simon, L. C. in *East Suffolk Catchment Board v. Kent*, (1941) A. C. 74 at pp. 86, 87.

7. 42 L. Q. R. 184; see also Winfield and Goodhart in 49 L. Q. R. 359; Winfield, 4 Camb. L. J. 197.

and causal relation and these actions are in that respect dissimilar to actions for other torts like nuisance, trespass or libel where negligence may have a bearing on the liability.¹ In *Grant v. Australian Knitting Mills, Ltd.*,² Lord Wright referred to the contrast between "negligence, where there is a duty to take care, being a specific tort in itself, and negligence being simply an element in some more complex relationship or in some specialised breach of duty." The reason for the above distinction is historical. The remedy for negligence was an action on the case which was different not only from actions of trespass but also from specialised forms of the action on the case which gave rise to nominate torts like nuisance, conversion, libel, etc. The rules that grew around these different sets of remedies are naturally dissimilar.

8. Duty towards the plaintiff.—This is an essential condition because conduct which is negligent with reference to one may not be so towards another. "The duty to take care is not in the air, but only towards particular people."³ For instance, an occupier of land owes a duty to the occupier of adjoining land to avoid discomfort from a nuisance but not to a licensee in it.⁴ The duty must be in respect of the particular conduct complained of.⁵ With regard to certain kinds of conduct, no duty of care is recognised by the law. There can be no action for loss caused by a criminal prosecution instituted carelessly but without malice.⁶ The law, as the authorities in England now stand⁷, does not enforce any general duty to take care in respect of the truth of one's statements, but the duty may arise towards particular persons by reason of a contract or a special relationship.⁸ A person may, by his imprudent conduct of his business or private affairs, cause great loss and harm to the members of his family or his employees, but is not liable to them in law. In England the question whether there is a duty is one of law in the sense that it is for the judge to decide.⁹ It is a question of fact in the sense that the decision depends on the circumstances of each case though also influenced sometimes by considerations of law and legal policy. Any

1. The distinction may in certain contexts not be substantial but only one of form or mode of proof; above, Chap. VI, paras. 61 and 62. As to pleading one form of negligence and amendment of it to another, see *Marshall v. London Passenger Transport Board*, (1936) 3 A. E. R. 83; *Bathing v. London Passenger Transport Board*, (1941) 1 A. E. R. 228 C. A. 2. (1936) A. C. at p. 103; below, para. 58.

3. *Per* Bowen, L. J., in *Thomas v. Quartermaine*, (1887) 18 Q. B. D. at p. 695; *per* Greer, L. J., in *Bottomley v. Bannister*, (1932) A. C. at p. 476.

4. Above, Chap. VI, para. 52.

5. *E.g.*, see *East Suffolk Rivers Catchment Board v. Kent*, (1941) A. C. 74 (in the absence of any duty laid by statute the defendants were not liable for the damage complained of); below, Chap. XVII, paras. 2 & 9.

6. Much less by a civil suit instituted carelessly; above, Chap. VIII, para. 5.

7. Above, Chap. IX, paras. 9 to 11. 8. Above, Chap. IX, para. 11.

9. Salmond, *Torts*, p. 458.

attempt to formulate a general rule defining the situations in which a duty will arise towards particular persons cannot be successful. "The grounds of action may be as various and manifold as human errancy; and the conception of legal responsibility may develop in adaptation to altering social conditions and standards."¹

9. Lord Esher's rule in *Heaven v. Pender*.—In *Heaven v. Pender*,² Brett, M. R., (afterwards Lord Esher) suggested the following rule defining the conditions under which a duty would arise:—

"Whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognise that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger."

In that case Cotton and Bowen, L.JJ., in the Court of Appeal were unwilling to concur in any such rule as it was too wide.³ In *Le Lievre v. Gould*,⁴ Lord Esher admitted that the rule was not applicable to a case of pecuniary loss caused by a careless misrepresentation but should be confined to cases of physical injury to person or property. Even in respect of such cases he introduced a limitation of proximity; "the duty will arise if a person is *near* to another or the property of another."

10. Theory of proximity.—In *Donoghue v. Stevenson*,⁵ Lord Atkin speaking of the rule propounded by Lord Esher in *Heaven v. Pender* observed: "To seek a complete logical definition of the general principle is probably beyond the function of the judge, for the more general the definition the more likely it is to omit essentials or to introduce non-essentials." Lord Atkin proceeded to say that the rule as framed was demonstrably too wide but if limited, as Lord Esher did later, by the qualification of 'proximity' or 'proximate relationship', it "was capable of affording a valuable practical guide."⁶ He went on to explain 'proximity' to mean not merely physical proximity but "to extend to such close and direct relations that the act complained of directly affects a person whom the person alleged to be bound to take care would know would be directly affected by his careless

1. *Donoghue v. Stevenson*, (1932) A.C. at p. 619, per Lord Macmillan.

2. (1883) 11 Q.B.D. 503, at p. 509; a workman employed by a shipowner to paint the ship was injured by falling from an insecure scaffolding provided by the defendants, dockowners. He was allowed to recover as an 'invitee' from an occupier of real property allowing a danger to exist in it.

3. See also *Barnes v. Irwell Valley Water Board*, (1939) 1 K.B. 21 at p. 33, per Greer, L.J.

4. (1893) 1 Q.B. at p. 497, per A.L. Smith, L.J., at p. 504; above, Chap. IX, paras. 9 and 10; per Lord Esher in *Lane v. Cox*, (1891) 1 Q.B. at p. 417. "The precision of a neat draftsman has never been counted among Lord Esher's accomplishments;" Sir F. Pollock, 49 L.Q.R. 25.

5. (1932) A.C. at pp. 581, 582; below, paras. 57-59.

6. See also Lord Macmillan at p. 614.

act.¹ He held that in this sense there was proximity between the manufacturer of an article which had a latent defect due to his carelessness and not discoverable by reasonable inspection by the buyer or any other person into whose hands it might pass and the ultimate consumer who bought it from a retail dealer. The introduction of the test of 'proximity' has since been criticised by Lord Wright in a similar case, on the ground that the test is appropriate to the question of causal relation and not to the present context.² If one may venture to say so with respect, the use of the test in the above extended sense appears to be artificial and does not really add to the basic test of 'the reasonable man's care.'

11. Reason for the requirement of duty.—The reason underlying the notion of duty³ in the English law appears to be that the standard of reasonable conduct is not determined entirely by the 'ordinary sense' of the jurymen but has also to conform to the judge's view of what, according to considerations of law and legal policy as well as precedents applicable to the facts of the particular case, should be regarded as reasonable conduct. In course of time judges in the exercise of their powers propounded rules and formulae which tended to obscure the doctrine of reasonable care and hamper its operation in many classes of cases. For instance, it was held for nearly a century till 1932 that a person who commits a negligent act in breach of a contract with another cannot be liable to a third party who may happen to be injured by his negligence.⁴ The rule of Lord Esher though vague and not a precise formula was perhaps a necessary reminder of what was often lost sight of, *viz.*, that reasonable care to avoid harm to another is the governing consideration for a judge in deciding the question of duty as it is for the jury in deciding whether there is a breach of it.⁵

12. Breach of duty to take care.—The question whether the defendant's conduct amounts to negligence or breach of duty to use reasonable care is a question of fact for the jury in England and has to be decided with reference to the facts of each case. The degree of care which would be reasonable in different cases cannot obviously be defined. But some situations are more familiar than others, and the constant application to

1. In his judgment in (1941) A.C. 74, the learned judge added the qualification "in some circumstances." As to this, see 57 L.Q.R. 179.

2. *Grant v. Australian Mills, Ltd.*, (1936) A.C. at p. 104; below, paras. 58 and 59; see also the criticism of Sir F. Pollock in 49 L.Q.R. 23. For cases where it has been applied, see below, para. 60.

3. On the theory of 'duty', see Winfield, *Law of Tort*, p. 428; W.W. Buckland in 51 L.Q.R. 637, 639. "The duty to take care is certainly a part of our law, but an unnecessary fifth wheel on the coach." The Restatement dispenses with the general requirement of duty and defines the care required in particular situations; II, § 281.

4. Below, para. 60.

5. *Haseldine v. Daw & Son, Ltd.* (1941) 2 K.B. 343, 359-62, per Scott, L.J.; *Glasgow Corporation v. Muir*, (1943) 2 A.E.R. 44, 50, per Lord Wright.

them of the abstract rule of 'reasonable care' has resulted in concrete rules defining the care required in such cases. We have for instance the rule of the road, and in a case of a motor collision the inquiry about reasonable care is reduced to the more precise and narrow one, 'Was the defendant on the left or right side of the road?'¹ The following are some categories where the law has arrived at certain rules on the duty towards particular persons and the requisite degree of care; (i) possession and ownership of land and buildings, (ii) possession and ownership of chattels, (iii) assumption of special relationships.

13. Duty of a person in possession of land and buildings.—The duty of a person in possession of land and buildings to take reasonable care about their safe condition arises in two cases. First, it may arise towards a person outside the premises, *e.g.*, a person using a highway or an occupier of adjoining property. The duty owed to such persons has been considered under the head of nuisance. Secondly, the duty of the occupier may arise towards a person entering his premises. While his duty to his neighbour arises from the improper user of his property, it arises towards a person entering it from his conduct in inviting or permitting the latter to enter it.² His duty differs according as the latter is an invitee, a licensee or a trespasser.³ The law casts the duty on the occupier, *i.e.*, the person in possession and control of the property. It will depend on the facts whether any person or which of several persons⁴ using the property is in control of it.

14. Invitee.—The term 'invitee' is here used in a technical sense and was defined by Justice Willes in the leading case of *Indermaur v. Dames*,⁵ to be "a person who goes upon business which concerns the occupier and upon his invitation express or implied," *e.g.*, a customer who goes into a shop,⁶ a person who goes into a railway station to buy a ticket

1. Holmes, Common Law, pp. 112, 113.

2. *Cameron v. Young*, (1908) A.C. 179, 180, per Lord Robertson.

3. *Addie v. Dumbreck*, (1929) A.C. 358, 364, per Lord Hailsham, L.C.

4. *E.g. Rippon v. Port of London Authority*, (1940) 1 K.B. 858 (owners of dock and firm of repairers); *Canter v. Gardener & Co.*, (1940) 1 A.E.R. 325 (contractor and sub-contractor). As to meaning of the word in the English Factories Act, 1937, see *Meigh v. Wickenden*, (1942) 2 A.E.R. 68; as to statutory duty of occupier of factory, see *Smith v. Cammell Laird & Co.*, (1940) A.C. 242; *Wilkinson v. Rea, Ltd.*, (1941) 1 K.B. 688 C.A.

5. (1866) L.R. 1 C.P. 274. Another definition is "a person having a common interest with the occupier"; per Scrutton, L.J., in *Hayward v. Drury Lane Theatre*, (1917) 2 K.B. 899 at pp. 913, 914. But Willes, J.'s definition appears to be more elastic. Lord Buckmaster spoke of the invitees being so described owing to "the deficiencies of the English language"; *Fairman v. Perpetual Investment Society*, (1923) A.C. at p. 80. In *Haseldine v. Daw & Son, Ltd.*, (1941) 2 K.B. 343 C.A. Scott, L.J., spoke of "invitee" as a horrid non-English word made common, if not invented, by our judges. He also expressed the opinion that what was required was not a common interest but only the interest, direct or indirect, of the occupier. See also below, para. 30.

6. *Indermaur v. Dames*, above.

or take delivery of goods,¹ a contractor or his workman engaged in the repair of another's premises.² A guest comes within the description of a licensee, or as he is called, 'a bare licensee,'³ but if he comes on business he is an invitee.⁴ A dancer who voluntarily attended rehearsals in a theatre, with the permission of a theatrical company in the hope of being engaged by the latter was held to be an invitee.⁵ The invitation may be express or implied but must be for purposes of business or material interest of the occupier. In *Fairman v. Perpetual Investment Building Society*⁶ the defendants had let out a block of flats to tenants and kept the common staircase in their own possession and control. The plaintiff who lodged with her sister in a flat on the fourth floor of which the sister's husband was tenant, was injured while descending the stair-case by the heel of her boot being caught in a depression in one of the steps and her falling down in consequence. Her action against the landlord was dismissed and the dismissal was upheld by a majority of the House of Lords on the ground that the danger was an obvious and not a concealed danger. The result would have been the same in this case whether the plaintiff was regarded as an invitee or licensee⁷ but in some of the judgments the view was expressed that she was only a licensee *quoad* the landlord, though the invitee of the tenant.⁸ In *Husleldine v. Daw & Sons Ltd.*,⁹ the plaintiff was a visitor of a tenant in an upper floor in a block of flats let out by the defendant and was seriously injured while using the lift on the invitation of the defendant's servant working the lift who motioned him to enter it. The defect in the lift was due to the negligence of the repairers. The action against the defendant was dismissed by the Court of Appeal on the ground that there was no negligence on the part of the defendants who had entrusted the repair to a competent firm of repairers. Scott, L.J. expressed the opinion that the dicta in *Fairman's case* did not

1. *Norman v. G.W. Ry. Co.*, (1915) 1 K.B. 584; *Holmes v. N. E. Ry.*, (1869) L.R. 4 Ex. 254; L.R. 6 Ex. 123; *Wright v. N.W. Ry. Co.*, (1876) 1 Ex.D. 252; *Mercer v. S.E. Ry.*, (1922) 2 K.B. 549 (person entering an open level-crossing). As to owner going into premises in occupation of builders building a house for him, see *Nubarro v. Cope & Co.*, (1938) 4 A.E.R. 565.

2. *Indermaur v. Damer*, above; *Elliott v. Roberts*, (1916) 2 K.B. 518; cf. *Batchelor v. Fortescue*, (1883) 11 Q.B.D. 474.

3. *Latham v. Johnson*, (1913) 1 K.B. at p. 410; *Southcote v. Stanley*, (1856) 1 H. & N. 247.

4. *Sutcliffe v. Clients' Investment Co.*, (1924) 2 K.B. 746.

5. *Hayward v. Drury Lane Theatre*, (1917) 2 K.B. 899; see also *White v. Franca*, (1877) 2 C.P.D. 308; *Gallagher v. Humphrey*, (1862) 6 L.T.N.S. 684; *Batchelor v. Fortescue*, (1883) 11 Q.B.D. 474 (where the plaintiff's negligence defeated his action).

6. (1923) A.C. 74, *per* Lords Atkinson, Sumner, and Wrenbury, *Lor*is Buckmaster and Carson diss.; below, para. 25.

7. *Ibid*, p. 92, *per* Lord Sumner

8. Lord Atkinson on the ground that the tenant was not authorised by the landlord to invite plaintiff; Lord Wrenbury, "plaintiff invitee of tenant, therefore licensee of landlord"; Lord Buckmaster, plaintiff, invitee; Lord Sumner, non-committal; Lord Carson, silent on the point.

9. (1941) 2 K.B. 848, 860, 861, *contra* on this point; see also 58 L.Q.R. 16.

prevent¹ his holding that the plaintiff was an invitee and not a licensee and the landlord has a business interest in making his stair-cases and lifts available to persons desiring to visit the tenants of his flats which for want of such facilities he would be unable to let. The question apparently calls for a fuller examination than was made or required in *Fairman's case* and when it is made, the reasoning of Scott, L.J. may be difficult to resist². A person entering a place of public recreation like a park or swimming pool provided by a civic authority enters as of right and is, it is submitted, properly regarded as an invitee,—whether the entrance is free or on payment³. He appears to satisfy the definition of 'invitee', as it is part of the business of such an authority levying rates from its citizens to provide places of recreation for them and their children.⁴ The alternative is to regard such a visitor as only a licensee towards whom the occupier's duty is to avert harm from dangers known to him and not to use care to ascertain them. But the visitor is entitled to something more than this "cold neutrality" of the occupier.⁵ A parent invited to attend an exhibition in a school in which her son was a pupil was held to be an invitee of the manager of the school who issued the invitations.⁶ The question is one of practical importance as actions for negligence against civic authorities for injuries sustained by such visitors, especially children, have become common in England. An invitation may be to one part of the premises but not to another.⁷ A workman working on

1. Goddard, L. J. held *contra* that the dicta did prevent, but agreed in the reasoning of Scott, L.J.

2. See also *Sutcliffe v. Clients' Investment Co.*, (1924) 2 K.B. 746 (workman employed by tenant to repair premises, invitee of landlord); *Smith v. London & St. Katherine Docks Co.*, (1868) L.R. 3 C.P. 326 and *Heaven v. Pender*, (1883) 11 Q.B.D. 503, above, para. 9, which interpreted the phrase in a wider sense. In the former a person who went on business to a ship lying in a dock was held an invitee of the Dock Co., in respect of the gangway provided by the Company. See also *The Kate*, (1935) P. 100; *Morgan v. Girls' Friendly Society*, (1936) 1 A.E.R. 404 (visitor of tenant, licensee) follows the dicta in *Fairman's case*.

3. *Glasgow Corporation v. Taylor*, (1922) 1 A.C. 44, at 60, 62, *per* Lord Shaw; Restatement II, § 344. See, however, *Ellis v. Fulham B.C.*, (1938) 1 K.B. 212; Greer, L.J., was inclined to take the above view, but Slessor and Mackinnon, L.JJ., held *contra*; *Coates v. Rawtenstall B.C.*, (1937) 3 A.E.R. 602. If the visitor does not comply with the regulations, he may be a licensee or a trespasser; *Purkis v. Walthamstow B.C.*, (1934) 151 L.T. 30.

4. With reference to the argument that civil authorities provided such places because they promised to do so out of the rates, Slessor, L.J., observed that there was no evidence of such a promise and even if there was, "there is not a material but, I suppose, only a spiritual interest in keeping promises"; *Ellis v. Fulham B.C.*, (1938) 1 K.B. at p. 229; with great respect, this is not very convincing.

5. *Per* Maughan, L.J., in *Purkis v. Walthamstow, B.C.*, above. He however would assign the visitor to a separate category which is not permissible under the case-law.

6. *Griffiths v. Smith*, (1941) A.C. 170.

7. "When you invite a person into your house to use the staircase, you do not invite him to slide down the banisters", *per* Scrutton, L.J., in *The Carlgarth*, (1927) P. 93, 110.

a ship in a floating dock was held not an invitee in respect of another part of the docks into which he strayed off during a dense fog in search of a lavatory with the result that he fell into the docks and was drowned.¹ Whether an invitation can be implied in respect of any part of the premises would depend on the circumstances. A lady who went to see her sick son in a ward in a hospital was held to be an invitee in respect of the surgeon's room where she went to speak to him about her son's illness, and slipped on a mat on a polished floor.²

15. Duty to an invitee.—In *Indermaur v. Dames*,³ Justice Willes defined the duty to be “to prevent damage from unusual danger.” He explained it thus :

“With respect to such a visitor at least, we consider it settled law, that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger, which he knows or ought to know; and that, where there is evidence of neglect, the question whether such reasonable care has been taken, by notice, lighting, guarding, or otherwise, and whether there was contributory negligence in the sufferer, must be determined by a jury as a matter of fact.”

In that case the plaintiff, a servant of a gas-fitter, employed by his master to do certain work in the sugar refinery of the defendant, fell through an unfenced hole in the floor and was seriously hurt. It was held that the defendant was liable because he was bound to warn the plaintiff of the hole or fence it.⁴ In other words the duty is to take reasonable care that the premises are safe.⁵

16. Duty to an invitee only in respect of unusual danger.—The duty arises only in respect of what has been described as an unusual, covert or concealed danger, or a trap,⁶ i.e., a danger which the invitee

1. *Mersey Docks v. Procter*, (1923) A.C. 253, 260; see also *Walker v. Midland Ry. Co.*, (1886) 55 L.T. 489 (guest in a hotel strayed at night in search of the water closet and fell into the well of a lift and was killed); *Humphreys v. Dreamland*, (1930) 100 L.J.K.B. 137 (H.L.) (invitation by owner of land let for shows does not extend to the side-shows in it); *Gilmour v. Belfast Harbour Commissioners*, (1934) 150 L.T. 63 (H.L.); *Hillen v. I.C.I. (Alkali)*, (1936) A.C. 65; *Lee v. Luper*, (1936) 3 A.E.R. 817; *Howard v. Farmer & Son, Ltd.*, (1938) 2 A.E.R. 296, (workman using incomplete stair-case, no invitation); cf. *Henaghan v. Rederiet*, (1936) 2 A.E.R. 1426; *Campbell v. Shellbourne Hotel*, (1939) 2 A.E.R. 351; *Gould v. McAuliffe*, (1941) 2 A.E.R. 527 C.A.; *Simons v. Winslade*, (1938) 3 A.E.R. 774 (C.A.).

2. *Weigull v. Westminster Hospital*, (1936) 1 A.E.R. 232. See also *Gillmore v. L. C. C.*, (1939) 103 J.P. 1; 37 L.G.R. 40 (plaintiff invited to physical training class on a dancing floor and hurt); cf. *Pitt v. Jackson*, (1939) 1 A.E.R. 129; *Beaumont Thomas v. Blue Star Line*, (1939) 3 A.E.R. 127 C.A. (a slippery floor is not by itself evidence of negligence).
3. (1866) L. R. 1 C P 274 at p 288.

4. The person who made the hole would be liable; *Kimber v. Gas Light Co.*, (1918) 1 K.B. 439.
5. *Addie v. Dumbreck*, (1929) A.C. at p. 365, per Lord Halskham.

6. These phrases and especially the word ‘trap’ are ambiguous as they are used also in connection with licensees; *W. H. Griffith*, 41 L.Q.R. 255.

could not by reasonable care avoid. If it was obvious or known to him, or he had been warned of it, a duty would ordinarily be negatived. A person entering an unlighted staircase or passage at night cannot complain of harm, as a prudent person unfamiliar with the place would not venture into it.¹ But mere knowledge or means of knowledge may not always be conclusive evidence to show that the invitee could have reasonably avoided it. For instance, a staircase covered with snow in a railway station was held to be a danger of which a passenger who slipped and fell on it could complain.² In cases of this kind a mere warning would not suffice; the occupier must take some protective precautions to prevent harm.³ A local authority licensed to keep an aerodrome was held liable for allowing some trees to be on it and without red lights displayed on the obstruction, as the trees constituted a trap.⁴

17. Duty to a child invitee.—To a child the occupier would obviously owe greater precautions than to an adult invitee. In *Glasgow Corporation v. Taylor*,⁵ a child who entered a botanical garden kept by the defendants, a civic corporation, ate some attractive-looking but poisonous berries in the garden and died. The representatives of the child were allowed to sue the defendants who should have warned or provided a fencing to prevent harm to children. Similarly where a child using a chute or a slide in a public recreation ground was, while descending, caught in a chain which had been fixed by another boy across the chute and which should have been removed if the attendant in charge had been careful, the borough council was held liable for the injury to the boy.⁶ A diving board near shallow water in a swimming pool would obviously be a trap and when a scout jumped from it and broke his neck the municipal authority in charge

1. *Huggett v. Miers*, (1908) 2 K. B. 278; *Lewis v. Ronald*, (1909) 101 L.T. 534; *Wilkinson v. Fairrie*, (1862) 1 H. & C. 633; *Chapman v. Rothwell*, (1858) F.B. & E. 168; a flight of steps without railings is not a trap; *Lucy v. Baxden*, (1914) 2 K. B. 318; *Dobson v. Horsley*, (1915) 1 K.B. 634; *Vorman v. G. IV. Ry. Co.*, (1915) 1 K.B. 584 (sloping bank in yard of a railway station, on which the plaintiff's horse backed the cart when left unattended, not a trap); *Weigall v. Westminster Hospital*, (1936) 1 A.E.R. 232 (a mat on a highly polished floor, a trap); *Mack v. M. S. M. Ry. Co.*, (1922) 45 M.L.J. 424 (an unlighted pit on a railway platform, a trap); *Ghosh v. B.N.IV. Ry.*, 1943 Pat. 177 (a depression in the platform).

2. *Letang v. Ottawa Electric Ry. Co.*, (1926) A.C. 725; but see *Brackley v. Midland Ry. Co.*, (1916) 85 L.J. K.B. 1596. See *Schlard v. L.N.E.R. Co.*, (1936) 1 A.E.R. (action by passenger getting down a staircase and falling off the edge of a railway platform not sufficiently lighted on a foggy night allowed).

3. According to the Restatement, Vol. II, § 343, "a public utility must give a warning adequate to enable the business visitor to avoid the harm without relinquishing any of the services which he is entitled to receive."

4. *Hesketh v. Liverpool Corporation*, (1940) 4 A.E.R. 429.

5. (1922) 1 A.C. 44. Above, Chap. VI, para. 11 and below, para. 26.

6. *Coates v. Rawtenstall B.C.*, (1937) 1 A.E.R. 333; the child was regarded as a licensee.

of the pool was held liable for his death.¹ Similarly when a child was injured by a piece of glass in the sand in a paddling pond for children, a borough council was held liable on the ground that the sand must have been cleared of glass pieces.² A child which has been invited into an area of danger cannot be treated as a trespasser if he was lured into a trap therein and was injured by meddling with it.³ But there is no liability when the danger was obvious even to a child and there was no want of reasonable care in failure to provide special precautions. Thus it was held that a civic authority was not under a duty to supervise the use of swings by children in a playground and was not liable for injury to a child who fell off a swing in motion and was hit by it.⁴

18. Nature of the occupier's liability to an invitee.—The duty of the occupier arises only in respect of a danger which he knew or ought to have known by reasonable care.⁵ He is therefore bound to take care to ascertain existing dangers, and cannot plead ignorance.⁶ He will be liable if his servant created or knew the danger. He will be liable also for a danger created by an independent contractor if he could by reasonable care have discovered and removed it. He cannot delegate his duty of care to a contractor and escape responsibility.⁷ But if there is no want of care on his part, he will not be liable for injury due to the fault of a competent contractor to whom he had entrusted work on his premises. Thus in *Haseldine v. Dawson & Son Ltd.*,⁸ the occupier was held not liable for a latent defect in the lift created by the negligence of the firm of repairers engaged to repair it. But the repairers were held liable. The occupier is also not liable for the casual or collateral negligence of a contractor employed to do a harmless piece of work e.g., a contractor's servant letting fall a tool from above while repairing the roof.⁹ When the injury does not result from any structural defect in the premises or any fault of the occupier or his

1. *Simmons v. Mayor of Huntington*, (1936) 1 A.E.R. 596

2. *Ellis v. Fulham B.C.*, (1938) 1 K.B. 212.

3. *Holdman v. Hamlyn*, (1943) 1 K.B. 664 C.A.

4. *Purkis v. Walthamstow B.C.*, (1934) 151 L.T. 30.

5. *Pritchard v. Peto*, (1917) 2 K.B. 173 (piece of cornice fell on plaintiff, defendant not liable as there was no proof of negligence on his part); above, Chap. VI, p. 164, note 3.

6. E.g., *Sutcliffe v. Clients' Investment Co.*, (1924) 2 K.B. 746. If however the defendant was a landlord not in possession, it is otherwise; see *Tredway v. Makin*, (1904) 20 T.L.R. 726 (plaintiff, a sub-tenant of defendant, was injured by a balcony giving way).

7. *Wilkinson v. Rea, Ltd.*, (1941) 1 K.B. 688 C.A. per Luxmoore, L.J.; see also *Marney v. Scott*, (1899) 1 Q.B. 986, 989, 990; *Shrimpton v. Herts C.C.*, (1911) 104 L.T. 145, 147; in C.A. 74 S.J. 395; cf. *Chelland v. Edward Lloyd Ltd.*, (1937) 53 T.L.R. 644.

8. (1941) 2 K.B. 343; above, para. 14.

9. Above, Chap VI, para 14; see also *Welfare v. Brighton Ry. Co.*, (1869) L. R. 4 Q. B. 693. For a case of contractor and sub-contractor doing work on premises, see *Canter v. Gardner & Co.*, (1940) 1 A.E.R. 325.

servants his liability can be made out only on proof of negligence. In *Glasgow Corporation v. Muir*¹ the managers of the Corporation Park gave permission to a church picnic party to have their tea in the tea room in the Park. While the tea was being carried in an urn through a narrow passage, the urn was for some unexplained reason dropped down with the result that the hot liquid scalded some children who were buying sweets or ices on one side of the passage. It was held by the House of Lords that the Corporation was not liable as danger to the children could not have been reasonably anticipated. The duty of the occupier is therefore only an application of the rule of reasonable care and not any special duty of insurance independent of the law of negligence.² A stricter duty may arise under statute.³

19. Duty to an invitee under contract.—When a person has a contractual right to enter another's premises, the terms of the contract will also determine the extent of the duty towards him. In the absence of express terms, the court would infer a duty in consonance with the nature of the contract with a view to give effect to it.⁴ Therefore the duty will differ in different kinds of contracts. In the case of a contract for entry into a building or other structure on payment, e.g., a theatre, hotel, race-stand, the duty is substantially the same as that towards an invitee on business already discussed. In *Francis v. Cockrell*,⁵ the plaintiff recovered damages for injuries due to the fall of a race-stand negligently constructed by the contractors employed by the defendant, and it was held that the defendant's duty was to see that his premises and the structures therein were as safe as reasonable care could make them. The duty being annexed to a contract was described as a warranty or an implied contract; but it is only a duty to use reasonable care and does not involve liability for defects or dangers not discoverable by due care.⁶ Dock-owners were held liable when the plaintiff's goods, viz., hides unloaded on the defendants' quay, were damaged by contact with some barilla ore which had been previously unloaded there and had got into the interstices of the floor.⁷ An innkeeper was held liable to a guest when fire broke out owing to a defective chimney.⁸ A guest in a

1. (1943) 2 A.E.R. 44 (H.L.)

2. *Ibid.*, at p. 50, per Lord Wright; see also *Francis v. Cockrell*, (1870) L.R. 5 Q.B. at p. 510, per Martin, B.; *Woodmen v. Richardson*, (1937) 3 A.E.R. 866, 870, per Scott, L.J.

3. Below, Chap. XVII. 4. Per Bowen, L.J., in *The Moorcock*, (1889) 14 P.D. 64, 68.

5. (1870) L.R. 5 Q.B. 501.

6. Per Kelley, C.B., in L.R. 5 Q.B. at p. 503. See however per McCaigie, J., in *Maclean v. Segar*, (1917) 2 K.B. 325 at p. 339; Pollock, Tort, p. 530.

7. *Liebig's Extract of Meat Co. v. Mersey Docks*, (1918) 2 K.B. 381. As to duty of dockowners to ships, see *The Bearn*, (1906) P. 48; *The Kate*, (1935) P. 100; *The Neptun*, (1938) P. 21 (duty of a buoyage and beaconage authority).

8. *Maclean v. Segar*, (1917) 2 K.B. 325; see also *Rudha Krishna v. O'Flaherty*, (1869) 3 B.L.R. (A.C.) 277; *Brannigan v. Huntington*, (1921) 37 T.L.R. 349.

hotel has a right to expect a passage leading to the lavatory to be lighted and could recover damages from the owner of the hotel for personal injury due to the passage being dark.¹ A person who went to the defendants' Turkish baths and slept in one of their rooms at night recovered for injuries due to being bitten by bugs.² In *Cox v. Coulson*,³ the plaintiff, a person witnessing a performance in a theatre, was hurt by a pistol which was fired by an actor as part of the play, and by some mischance contained a cartridge. The defendant was the lessee of the theatre but the play was performed by a theatrical company who provided the actors, scenes, etc. It was held the defendant was bound to exercise careful supervision over the use of fire-arms in the course of the performance and was liable. But the duty does not amount to an absolute warranty of safety. In *Hall v. Brooklands Auto-Racing Club*,⁴ the defendants, the owners of a racing track for motors, were held not liable for injury to some of the spectators which occurred by the collision of two racing cars resulting in one of them shooting up and falling over the railings near the spectators. The danger was one which any spectator could foresee as well as the defendants, who had no special grounds for considering it likely as it had not occurred for many years. Nor does the duty extend to provide against obvious risks. While the plaintiff in *Francis v. Cockerell* could complain of injury due to the fall of the race-stand, he could not have complained that the stand was uncovered in winter and he caught a bad cold by sitting on it.⁵ In the above type of cases, the duty is contractual but it is also possible to treat it in the alternative as a delictual duty defined in *Indermaur v. Dames*, because the contract is evidence of the kind of invitation which attracts the rule in that case.⁶ But other contracts may involve different duties. In a contract of employment the workman is presumed to take the risk of injury due to the negligence of his fellow-servants or incident to the employment.⁷ The employer's duty is therefore narrower, and he warrants only his personal care. Thus a chauffeur employed by the defendant could not recover for injury due to the fall of a pane of glass from the door of the garage, as the accident was due not to any want of care of the defendant but, if at all, to that of some fellow-servant who failed to notice the defect.⁸

1. *Campbell v. Shelburne Hotel*, (1939) 2 K.B. 534. See *Gould v. McAuliffe*, (1941) 2 A.E.R. 527 C.A. 2. *Silverman v. Imperial London Hotels*, (1927) 137 L.T. 57.

3. (1916) 2 K.B. 177. Cf. *Humphreys v. Dreamland*, (1930) 100 L.J. K.B. 137 (H.L.) (proprietor of land let for shows, not liable for dangerous mechanism in a side-show); *Sheehan v. Dreamland*, (1923) 40 T.L.R. 155; *Fraser Wallis v. Waters*, (1939) 4 A.E.R. 609 (action by a person in the audience hit by the heel of a shoe from one of the dancers failed as there was no negligence of defendants).

4. (1933) 1 K.B. 205.

5. *Per* Scrutton, L.J., in (1933) 1 K.B. 205 at p. 215.

6. But the plaintiff cannot disregard the contract and allege a wider liability in tort; *per* Scrutton, L.J., in (1933) 1 K.B. at p. 213.

7. *Priestly v. Fowler*, (1837) 3 M. & W. 1; below, Chap. XVI, para. 19.

8. *Cole v. De Trafford*, (No. 2), (1918) 2 K.B. 523.

20. Licensee.—A licensee is one who has the licence or permission of the occupier to enter or use his premises.¹ He may belong to one of the following dissimilar classes of visitors; (i) those who come on express invitation but not on any business or material interest of the occupier; (ii) those who have his implied leave to enter or use the premises; (iii) those who have legal authority to enter even against his will and are entitled to the same protection as those permitted to enter.

21. Guest.—A guest invited not on business but for a friendly or social visit, is a licensee and not an invitee. In *Southcote v. Stanley*,² a person invited by the defendant, a proprietor of a hotel, and injured by the fall of a pane of glass from a door, was held not entitled to recover. Pollock, C. B., said that a guest became, by his entry, a member of the defendant's establishment or household and could not complain of the negligence of the occupier's servants as he was in the position of their fellow-servant.³ Baron Bramwell suggested the analogy that a person asked by his friend to sleep in the latter's house could not complain of the bed sheets being badly aired and his catching a cold.

22. Implied licence.—Whether a licence could be implied, depends on the circumstances. In the case of a friend who comes for a social call or a salesman who comes for showing his wares, it is implied in the sense that if express permission was asked for it would have been granted. Similarly a friend or relative of a tenant as the plaintiff in *Fairman's case*⁴ may well assume the leave of the occupier for using the common staircase. On the other hand permission may also be implied from the occupier's failure to object or to take practical steps to prevent the entry of persons who have no reason to expect him to grant any express permission to enter his land, such as a person habitually using it for walking across or a child for playing on it. It is not, however, mere tolerance that should be proved but permission, though the tolerance may be so pronounced as to lead to an inference of permission.⁵ Where permission or tacit consent is not established, the person entering falls within the category not of a licensee but of a trespasser. "The line that separates each of these three classes is an absolutely rigid line. There is no half-way house, no no-man's land between adjacent territories. When a judge decides into which category a particular case falls, the law of that category will rule and there must be no

1. Cf. s. 52, Indian Easements Act.

2. (1858) 1 H. & N. 247; the only direct decision on the point which however is treated as settled; *Latham v. Johnson*, (1913) 1 K.B. at p. 410, per Hamilton, L.J.

3. For a similar argument, see *Abraham v. Reynolds*, (1860) 5 H. & N. 143.

4. (1923) A.C. 74, above, para. 14; *Morgan v. Girls' Friendly Society*, (1936) 1 A.E.R. 404.

5. *Addie v. Dumbreck*, (1929) A.C. 358 at p. 373, per Lord Dunedin.

looking to the law of the adjoining category."¹ In *Lowery v. Walker*,² members of the public were habitually walking across a field of the defendant for taking a short cut though he had long ago put up a notice warning trespassers. He had complained to the police occasionally but refused to prosecute, as some of them were customers in his milk trade. The plaintiff, a person walking along, was held to be a licensee. In the case of children, the inference may arise more easily than in the case of adults. In *Cooke v. Midland Great Western Railway of Ireland*,³ the defendants, a railway company, were held liable for injury sustained by a child aged four, meddling with a turn-table in their premises. It was proved that they had allowed the plaintiff and other children to go to the place and play habitually, and had kept the machine unlocked and unfastened. The child was regarded as a licensee. The question of licence and that of 'trap' or concealed danger though usually regarded as separate questions may really be inter-connected because the precautions required to prevent the entry of others may vary with the kind of danger in the premises. Where adequate precautions are taken there is neither licence nor trap. In *Addie v. Dumbreck*,⁴ the defendants, a colliery company, were held not liable for the death of a boy who was crushed in the terminal wheel of a haulage system worked by them. The place was used as a playground by children who had been warned but disregarded the warnings. On the facts of the case the child was regarded as a trespasser not entitled to any special precautions for its safety. On the other hand in *Excelsior Wire Rope Co. v. Callan*,⁵ two children who were injured by playing with dangerous machinery worked by the defendants were held entitled to recover. The defendants had allowed children to go there from an adjoining playground and play round the machine except when they worked it about thrice a week. When they were about to work it, they would see if

1. (1929) A.C. at p. 371, *per* Lord Dunedin. 2. (1911) A.C. 10.

3. (1909) A.C. 229. This decision has been criticised as having been influenced by sentimental sympathy instead of legal principle; see Beven, *Negligence*, Vol. I, pp. 189-220; Jeremiah Smith, *Selected Essays*, pp. 357, 397; *Liddle v. Yorkshire C.C.*, (1934) 2 K.B. 101, 111, *per* Scrutton, L.J. On the finding that the plaintiff was a licensee, (see however *Ellis v. Fulham B.C.*, (1938) 1 K.B. at p. 226, *per* Greer, L.J.) the decision is unexceptionable and has been followed in later cases in England. For similar turn-table cases in the U.S.A., see *Rail Road Co. v. Stout*, (1873) 17 Wall. (U.S.) 657; *Wigmore, Cases on Torts*, Vol. II, pp. 226, 227; *Restatement*, II, § 339.

4. (1929) A.C. 358. See also *Hardy v. Central London Ry. Co.*, (1920) 3 K.B. 459. In the *United Zinc & Chemical Co. v. Van Briti*, (1922) 258 U.S. 268; 36 A.L.R. 28, two boys went into defendants' garden and entered a pool of water which was poisoned with sulphuric acid. They were poisoned and died. The Supreme Court held the defendants not liable. The contention that there were roads in the defendants' land which might have acted as an invitation was met by Holmes, J., with the answer "a road is not an invitation to leave it elsewhere than at its end."

5. (1930) A.C. 404; see *per* Scrutton, L.J., in *Mourton v. Poulter*, (1930) 2 K.B. 183 at p. 190. See also *Holding v. Hamlyn*, (1943) 1 K.B. 664 C.A.

it was clear of children. On that occasion they did not do so properly. It was held that the plaintiffs were not trespassers and that even if they were, the defendants acted in reckless disregard of their presence. Where a highway authority had, in the course of making an improvement, excavated soil and heaped it near a retaining wall in a spot which had not been made a highway, a boy who had climbed the heap and sat on the wall and fell down, was held to have had no licence to do so and was regarded as a trespasser. There was no such danger as required any special precautions beyond warning off the boys who came there.¹ The licence may be limited to a particular part of the occupier's premises.² It may also in the case of a child be conditional on the child being guarded or taken care of by its custodian.³

23. Legal authority to enter.—A person with a legal authority to enter, like a policeman with a warrant of arrest or a customs official in search of a contraband article, though an unwelcome visitor, would appear to be entitled to the same protection as a licensee from an occupier who is aware of his presence or its likelihood.⁴ If, of course, he has no legal right to enter, he is only a trespasser and enters at his own risk.⁵

24. Duty to a licensee.—The duty to a licensee is not to lay or set a trap for him, *i.e.*, not to expose him to a concealed danger of which the occupier is aware and the licensee is not aware and cannot be aware by the exercise of reasonable care.⁶ The licensee is regarded as occupying the position of a donee accepting a gift and cannot therefore complain of defects in the subject of the gift; "any such conduct will wear the colour of ingratitude."⁷ But he can complain if the donor or licensor knowingly exposes him to a trap or hidden danger. "There must be something like fraud on the part of the donor before he can be made answerable." This is how the rule was stated by Justice Willes in another well-known judgment of his in *Gautret v. Egerton*.⁸ The defendants were owners of certain land with a canal and cuttings intersecting the same and bridges across the

1. *Liddle v. Yorkshire C. C.*, (1934) 2 K.B. 101.

2. *Schofield v. Bolton Corporation*, (1910) 26 T. L. R. 230 (child playing on a pile of sleepers in defendant's land and straying on to a railway line); see also *Jenkins v. G. W. Ry. Co.*, (1912) 1 K.B. 525

3. *Burchell v. Hickisson*, (1880) 50 L.J.C.P. 101; *Latham v. Johnson*, (1913) 1 K. B. 398, 404, 407.

4. Restatement, II, § 346.

5. *G. C. Ry. Co. v. Bates*, (1921) 3 K.B. 578; see *Davis v. Lisle*, (1936) 2 A. E. R. 213; above, Chap. IV, para. 38.

6. *Fairman's case*, (1923) A.C. at pp. 86, 96; above, para. 14; *Norman v. G.W. Ry. Co.*, (1915) 1 K.B. 584, 591. The phrase 'set a trap' was first used by Willes, J., in *Corby v. Hill*, (1858) 4 C.B.N.S. 556; see also *Latham v. Johnson*, (1913) 1 K.B. at p. 405.

7. *Per* Willes, J., in *Indermaur v. Dames*, (1866) L.R. 1 C.P. at p. 285.

8. (1867) L.R. 2 C.P. 371 at p. 375; described as a 'great judgment' by Buckley, L.J., in *Lowery v. Walker*, (1910) 1 K.B. at p. 190; Hamilton, L.J., in *Latham v. Johnson*, (1913) 1 K.B. 398, 404, explained the duty in similar terms.

canal which led to certain docks. A person who was habitually using the land and bridges for going to the docks, while going along a bridge, fell into one of the cuttings and was drowned. An action by his representatives was disallowed as there was no breach of duty disclosed by the plaintiff.

25. Duty to a licensee only in respect of concealed danger.—The duty arises only in respect of a concealed and not an obvious danger.¹ Whether a danger is the one or the other depends on the circumstances. In *Fairman's* case² the staircase was made of reinforced concrete and a depression formed in one of the steps by the concrete wearing away was held to be an obvious and not a concealed danger for the plaintiff who had been living in the premises for some months.

26. Duty to a child licensee.—What is an obvious danger to an adult may not be so to a child. A railway turn-table or a poisonous berry in a public garden may be a trap for a child but not for an adult. Ordinarily the occupier discharges his duty to a licensee by warning him or disclosing the danger to him³; but in the case of children, a warning may not be enough and other precautions may be necessary to avoid harm to them. The phrases 'trap'⁴ and 'allurement' are often used in this context but it is necessary to remember that the mere tendency of an object in the occupier's premises to allure children would not make him liable. If he takes sufficient precautions to warn them off, it ceases to be a trap in law, as for instance, the dangerous machinery in *Addie v. Dumbreck*⁵. "Temptation is not invitation".⁶ Besides it is not every object that attracts infantile fancy or mischief that is a trap in law. There is no object which is so common or innocuous that no child can be tempted to meddle with it and injure itself. A child who plays with a heap of stones,⁷ climbs a wall,⁸ or a tree, or a lorry,⁹ or enters a pool of water¹⁰ in another's premises cannot

1. Above, para. 16; see also *Colehill v. Manchester Corporation*, (1928) 1 K.B. 776; *Latham v. Johnson*, (1913) 1 K.B. at p. 411; *Stone v. Jackson*, (1885) 16 C.B. 199; *Lakshmi Chand v. Ratan Bai*, (1926) 29 Bom. L.R. 78.

2. (1923) A.C. 74; above, para. 14; cf. *Dunster v. Hollis*, (1918) 2 K.B. 795.

3. *Norman v. G. W. Ry. Co.*, (1915) 1 K.B. at p. 591.

4. "A trap is a figure of speech, not a formula;" "in the case of infants, there are moral as well as physical traps;" "a trap has the two qualities of fascination and fatality"; *Latham v. Johnson*, (1913) 2 K.B. at p. 415, *per* Hamilton, L.J., referred to in (1939) 4 A.E.R. at p. 94. 5. (1929) A.C. 358; above, para. 22.

6. *Per* Holmes, J., in the *United Zinc & Chemical Co. v. Van Brit*, (1922) 258 U.S. 268; above, para. 22, p. 406, note 4.

7. *Latham v. Johnson*, above; *Morley v. Staffordshire C.C.*, (1939) 4 A.E.R. 92 C.A. (A heap of metal in a road).

8. *Liddle v. Yorkshire C.C.*, (1934) 2 K.B. 101; above, para. 22.

9. *Rawsthorne v. Otley*, (1937) 3 A.E.R. 902; cf. *Culkin v. Mc Fie & Sons*, (1939) 3 A.E.R. 613; above, Chap. VI, para. 11.

10. *Liddle v. Yorkshire C.C.*, (1934) 2 K.B. at p. 112, *per* Scrutton, L.J.; *United Zinc & Chemical Co. v. Van Brit*, above. ●

complain of injury resulting thereby. In such cases the occupier may not be bound to do more than warn trespassing children off his premises.¹

27. Nature of the occupier's liability to a licensee.—The duty arises only in respect of dangers of which the occupier was aware. In the case of new dangers created by him after permitting the licensee to enter, his liability is clear, *e.g.*, letting loose a savage horse in a field habitually used by others for passing along,² or digging a trench in his land over which another has a right of way.³ In the case of dangers which already exist, his knowledge of them is essential to create a duty.⁴ The knowledge of his servants may be enough.⁵ There are, however, passages in the judgments in *Fairman v. Perpetual Investment Building Society*,⁶ in favour of the view that the occupier would be liable even when he did not know but ought to have known of the existence of the danger. On that view the duty to a licensee would be larger than that enunciated by Justice Willes and nearly identical with the duty to an invitee. In any case the occupier is not responsible to a licensee, as he would be to an invitee, for a danger which is created by an independent contractor and is unknown to him. Where a person who went to visit a tenant in the defendants' premises saw the lift door partially open and went in and fell into an open shaft, it was held that the defendants were not liable as they had entrusted the lift to the care of a competent firm of contractors.⁷

28. Duty to a trespasser.—A trespasser is one who has no leave or licence to enter another's premises. He trespasses at his own risk. The occupier has no duty to warn him of existing defects, much less to take precautions for his safety. A railway company was held not liable to a person travelling without a ticket and injured by a collision.⁸ A policeman who entered the defendant's premises at night suspecting something wrong and fell into a saw-pit was held to have no remedy, as he had no right

1. *Liddle v. Yorkshire C. Co.*, above. 2. *Lowery v. Walker*, (1911) A.C. 10.

3. *Corby v. Hill*, (1858) 4 C. B. N. S. 556; *Evans v. Bombay Port Trust*, (1886) I. L. R. 11 Bom. 329.

4. *Coltiss v. Selten*, (1868) L.R. 3 C.P. 495 (occupier not liable when a chandelier hung on a wall fell on the plaintiff). If the rule laid down by Willes, J., were strictly applied, an occupier ought not to be liable for dangers known to him but not created by him, to a person whose presence was not permitted but only tolerated; but such perhaps is not the law; on this point, see Scrutton, L.J., in *Hayward v. Drury Lane Theatre*, (1917) 2 K. B. at p. 914; *Coleshill v. Manchester Corporation*, (1928) 1 K. B. 770, 789.

5. *Smith v. London & St. Katharine Docks*, (1868) L.R. 3 C.P. 326.

6. (1923) A.C. 74, 86, 96, per Lords Atkinson and Wrenbury; see also *Addie v. Dumbreck*, (1929) A.C. at p. 365, per Lord Hailsham; Bohlen, *Studies*, p. 60. See, however, *Haseldine v. Daw & Son Ltd.*, (1941) 2 K. B. at p. 372, per Goddard, L.J.; *Sutcliffe v. Gt. Northern Investment Co.*, (1924) 2 K.B. at p. 755; Restatement, II, § 342.

7. *Morgan v. Girls' Friendly Society*, (1936) 1 A.E.R. 404.

8. *Grand Trunk Ry. of Canada v. Barnett*, (1911) A.C. 361; cf. *G. N. Ry. Co. v. Harrison*, (1854) 10 Ex. 376.

to enter.¹ Even if he should be regarded not as a trespasser but as having a legal right to enter, the defendant could not be held negligent in failing to make his premises safe for such an unexpected visitor.² But a trespasser, though he has no right to active protection, is not an outlaw and the occupier has some obligations even towards him. In the first place, he owes a duty not to cause wilful injury except what is reasonably necessary to avoid the entry of a trespasser or expel him after entry.³ The occupier cannot for instance shoot or belabour an intruder or set man-traps like a spring-gun.⁴ He may however adopt reasonable measures for prevention of trespass,⁵ e.g., putting up a barbed wire fence, a gate with iron spikes, or a wall with broken glass.⁶ A trespasser or a thief hurt by such things cannot obviously complain. Secondly, the occupier owes a duty not to do any act involving danger to trespassers in the premises with knowledge of their presence or its likelihood. With such knowledge, the occupier cannot for instance cause a dangerous explosion or practise shooting in his premises.⁷ A person who felled a tree was held liable for injury to children who were there to his knowledge though without his permission.⁸ A driver of a railway engine who sees a trespasser on the line is bound to use reasonable care to avoid running over him, by way of whistling and warning, or if need be, by slowing or stopping the train.⁹ Knowledge of the trespasser's presence or its likelihood is essential to make the occupier liable.¹⁰ He is not bound to assume that others would commit trespass; on the other hand he is entitled to assume the contrary. But an occupier of premises with a source of danger like an unfenced excavation near a highway is bound to expect that persons may stray off the highway by mistake at night time and would be liable to a person who thus sustains injury.¹¹ A person about to

1. *G. C. Ry. Co. v. Bates*, (1921) 3 K.B. 578; see also *Coffee v. McEvoy*, (1912) 2 Ir. R. 290, 296; *H. M. S. Glutton*, (1923) P. 215; *Murley v. Grouse*, (1882) 46 J.P. 360.

2. (1921) 3 K.B. 578 at p. 581.

3. *Addie v. Dumbreck*, (1929) A.C. at p. 363; *Latham v. Johnson*, (1913) 1 K.B. at p. 411; *Davis v. Lisle*, (1936) 2 A.E.R. 213.

4. *Bird v. Holbrook*, (1928) 4 Bing. 628; see *Darg v. Midland Ry. Co.*, (1857) 1 H. & N. at p. 780, per Bramwell, B. The earlier case of *Hott v. Wilkes*, (1829) 3 B. & Ald. 304, where the plaintiff who was hurt by a spring-gun was non-suited on the ground of his entering with knowledge of it, led to the passing of 7 & 8 Geo. 4, c. 18, superseded by 24 and 25 Vict., c. 100, s. 31, which made the setting of spring-guns a criminal offence; to set a spring-gun not dangerous to life but intended to cause alarm is not an offence; *Wootton v. Dawkins*, (1837) 2 C.B.N.S. 412. 5. *The Carlgarth*, (1927) P. 93.

6. *Dane v. Clayton*, (1370) 7 Taunt. p. 521; as to keeping a dog accustomed to bite men, see *Sarch v. Blackburn*, (1830) 4 C. & P. at p. 300; *Brock v. Copeland*, (1794) 1 Esp. 203; *Lennon v. Fisher*, (1923) 25 Bom. L.R. 873 (plaintiff, an invitee, bit by a dog).

7. For an illustration of a trespasser whose presence was unsuspected being able to sue, see Restatement, II, § 336, Illustration 2. 8. *Mourton v. Poulter*, (1930) 2 K.B. 183.

9. *Ismail v. B. B. & C. I., Ry. Co.*, (1932) 34 Bom. L.R. 826, 831, per Beaumont, C.J. The decision was however against the plaintiff on the facts.

10. *Lowery v. Walker*, (1910) 1 K.B. 173; *Petrie v. Rostrevor*, (1898) 2 Ir. R. 556.

11. *Barnes v. Ward*, (1850) 9 C.B. 392; above, p. 161.

do in his premises some act or work of an unusual and extra-hazardous nature is bound to warn outsiders against danger.¹

29. Difference between an adult and a child trespasser.—In the application of these principles there is no distinction between an adult and a child trespasser in the sense that there is no special duty towards the latter.² But a difference may arise in two ways. First, in the case of a child a licence may be more easily inferred than in the case of an adult from the occupier's conduct in failing to take reasonably effective steps to prevent the entry of the former.³ Secondly, the defence of contributory negligence or consent may be more hard to establish against a child than against an adult.⁴

30. Law as to duties of occupiers.—Before passing from the above statement of the law as to the duties of occupiers of premises, it may be perhaps useful to note some of its features. (a) The case-law in England has evolved a threefold formula⁵ of duties to invitee, licensee and trespasser, but the formula still leaves a substantial region in which judge and jury have to apply the rule of reasonable care to the facts before arriving at a decision. For instance whether a duty to an invitee is discharged by a warning or by other precautions and whether a licence is to be implied or not are questions which stand outside the formula. (b) The advantage of a formula is its certainty. The present formula lacks it in one particular owing to the dicta which suggest that a licensor is liable for dangers which he did not know but ought to have known.⁶ (c) The disadvantage of a formula is its rigidity which may make it inadequate to meet changing needs. Thus we find the phrases 'invitee' and 'licensee' are tending to become technical terms and lose their natural meaning. Only in that way could they include new and dissimilar groups of persons. For instance an unwelcome visitor has to be regarded as a licensee. So we find a Lord Justice in the Court of Appeal saying, "Personally I think the names or nick-names that have been customarily applied to describe those three categories are a little unfortunate."⁷ (d) The formula seems in some cases to hamper a proper application of the rule of reasonable care. Thus we have the anomalous result in *Fairman's* case that the owner in possession of the common stair-case

1. *Lowery v. Walker*, above (leaving a horse in a field was held not of that type).

2. *Addie v. Dumbreck*, (1929) A.C. 358. See also *Singleton v. Eastern Counties Ry.*, (1859) 7 C.B.N.S. 287; *Hardy v. Central London Ry. Co.*, (1930) 3 K.B. 459; *Jenkins v. G.W. Ry.*, (1912) 1 K.B. 525; *Schofield v. Bolton Corporation*, (1910) 23 T.L.R. 230; cf. *Williams v. G.W. Ry. Co.*, (1874) L.R. 9 Ex. 157 (where the child was not a trespasser).

3. Above, para. 22.

4. Below, para. 84.

5. The American Restatement has a twofold division of licensee and trespasser and a licensee may be a gratuitous licensee, a business visitor or patron. Public utilities are separately dealt with. Vol. II, §§ 329-332, §§ 345-350.

6. Above, para. 27.

7. *Ellis v. Fulham R.C.*, (1938) 1 K.B. at p. 233, per MacKinnon, L.J.

or other part of the premises owes one duty to his tenant and another to the tenant's wife.¹ A railway company would owe one duty to a passenger and another to a friend of the latter who went into the platform to see him off without being required to pay for the entry. These anomalies result from the definition of an 'invitee' as one who goes on business of the occupier. An interpretation of it in a slightly extended sense so as to include those whose entry concerns the occupier's business indirectly as well as directly was attempted in some of the earlier cases but was not countenanced by the House of Lords who applied the phrase in a strict sense.

31. **Duty of an owner of land or buildings.**—Under this head we have to consider the duties of a lessor or vendor to his lessee or vendee as well as to others in respect of defects existing at the time of the lease or sale or afterwards.

32. **Duty of a lessor to a lessee in respect of defects existing at the time of the lease.**—This is governed by the contract of lease. Where it is silent, his duty is, under the Transfer of Property Act, to disclose defects of which he is aware and the lessee is not aware and could not with ordinary care discover.² He need not therefore disclose patent defects. Subject to the above duty the lessor does not warrant the fitness of the premises.³ In England there is an exception in the case of a lease of furnished premises; the lessor warrants them to be fit for habitation at the commencement of the tenancy.⁴ In other cases, the general rule is that in the absence of fraud or breach of express warranty a lessor is not liable for letting a tumble-down house;⁵ the tenant must take the property as he finds it.⁶ In England this rule has been laid down in rather broad terms so as to confer an undue immunity on landlords and vendors of real property.⁷ It was modified in the case of small tenements by the Housing

1. The law is different in the U.S.A.; Restatement II, § 360.

2. S. 108.

3. But he warrants the fitness of the power which he agrees to supply to the tenant's premises; *Bentley Bros. v. Metcalfe & Co.*, (1906) 2 K.B. 548.

4. *Collins v. Hopkins*, (1923) 2 K.B. 617; *Wilson v. Finch-Hatton*, (1877) 2 Ex. D. 336; *Smith v. Murrable*, (1843) 11 M. & W. 5. There is no warranty in respect of subsequent defects; *Sarson v. Roberts*, (1895) 2 Q.B. 395; nor for unfurnished premises; *Cruse v. Mount*, (1933) 1 Ch. 278. For a similar warranty in the case of urban houses in Scotland, see *Cameron v. Young*, (1908) A.C. 176.

5. *Per Erle, C.J.*, in *Robbins v. Jones*, (1863) 15 C.B.N.S. 221; "Fraud apart, there is no law against letting a tumble-down house."

6. *Sutton v. Temple*, (1843) 12 M. & W. 52; *Chester v. Cater*, (1918) 1 K.B. 247; *Bottomley v. Bannister*, (1932) 1 K.B. 458; *Otto v. Bolton*, (1936) 2 K.B. 46. See also *Shirvell v. Hackwood Estates*, (1938) 2 A.E.R. 1 (defendants, lessors, not liable for dead branch of tree falling on workman of lessee and killing him.)

7. *E.g. Bottomley v. Bannister*, (1932) 1 K.B. 458, 468, *per Scrutton, L.J.*; below, para. 37. Prof. Bohlen considers that the other decisions in favour of landowners were influenced by class sympathy; 50 Har. L.R. 735.

Acts¹ but in other respects continues to be part of the law. It would seem to apply only to patent defects. In respect of latent defects or dangers which the owner knew or ought to have known it would seem that he ought to be held liable. This would be a rational statement of the principle and in accordance with recent developments in the sphere of responsibility for delivery of dangerous chattels. If there is a contract to repair, the landlord may become liable to his tenant for the injury resulting from even a patent defect. In *Porter v. Jones*² a landlord had failed to perform his covenant to repair a ceiling which was bulging. In an action by the tenant who was injured by the collapse of the ceiling some months after the tenancy began, it was held that she could recover and that the landlord could not plead that the tenant acted unreasonably in using the kitchen with the bulging ceiling after the landlord had failed to repair it.

33. Duty of a lessor to his lessee in respect of defects arising after the lease.—In respect of defects arising after the lease, the lessor is not liable to the lessee except for a breach of a covenant to repair. Where the lessor is in possession of any part of the premises like a common staircase, the lessor is under a duty both as an implied term of the contract and also independently of it, to keep it as safe as reasonable care could make it.³ Where the landlord retained the roof in his control, and owing to a gutter pipe from the roof being defective and in bad repair, the water leaked to the walls of the tenant's room and made it damp, he was held liable for neglect to repair with knowledge of the defect.⁴ He would be liable even if he did not know but could have known of it by due care.⁵

34. Duty of a lessor to strangers in respect of defects existing at the time of the lease.—To such persons it is not the lessor but the lessee that is liable. In *Lane v. Cox*,⁶ the landlord was held not liable to a workman who came at the request of a weekly tenant and was injured by using a staircase which was in an unsafe condition. To this rule one

1. Housing, Town-Planning etc., Act, 1909, sec. 14 and the Housing Acts, 1925 (S. 1), 1936 (S. 2) which imply a term in the contract of tenancy that the premises were at the beginning of the tenancy and would be kept afterwards reasonably fit for habitation. For cases under these Acts, see *Ryall v. Kidwell*, (1914) 3 K.B. 135; *Morgan v. Liverpool Corporation*, (1927) 2 K.B. 131; *Summers v. Salford Corporation*, (1943) A.C. 283. See *Betts v. Fenge U.D.C.*, (1942) 2 A.E.R. 61.

2. (1942) 2 A.E.R. 570 C.A.

3. *Dunster v. Hollis*, (1918) 2 K.B. 795; *Lakshminchand v. Ratanbai*, (1926) 29 Bom. L.R. 78.

4. *Cockburn v. Smith*, (1924) 2 K.B. 119, 129, Bankes, L.J.; see also *Hargroves v. Hartopp*, (1905) 1 K.B. 472; cf. *Ivay v. Hedges*, (1882) 9 Q.B.D. 80, which proceeded on the special terms of the contract.

5. *Bishop v. Consolidated London Properties, Ltd.*, (1933) 102 L.J.K.B. 257 (where the gutter pipe was choked by a dead pigeon and its nest and water escaped into the tenant's flat). For a case of loss due to improper execution of repair under a covenant, see *Grag v. Plangue*, (1936) 1 K.B. 569.

6. (1897) 1 Q.B. 415.

qualification may be suggested, *viz.*, where the lessor is guilty of fraud or negligence and leases a building or other premises with knowledge of a latent defect which the lessee cannot discover and involves imminent danger to person and property.¹ In the United States persons who lease premises with artificial structures like race-stands, diving-chutes, etc., intended for the use of large numbers of the public have been held liable for negligently leasing them in an unsafe condition.²

35. Duty of a lessor to strangers in respect of defects arising after the lease.—In respect of dangers which arise after the lease, the lessor is under no liability to strangers though he may be under a covenant with the lessee to repair them. In *Cavalier v. Pope*,³ a landlord was held not liable to the tenant's wife who fell through the kitchen flooring which he had agreed with the tenant to repair. This rule will not of course apply where the landlord has reserved control of any part of the premises and injury results from his neglect to keep it in good order. In *Cunard v. Antifyre, Ltd.*,⁴ the defendants had let their building in flats and reserved the roof and guttering in their control. Owing to a defect in the guttering, a piece of it fell on the glass roof of a kitchen in the third floor and the wife of the tenant of that floor was injured by glass pieces. It was held that she could recover.

36. Criticism of the rule in *Cavalier v. Pope*.—The rule in *Cavalier v. Pope* has never been questioned in England,⁵ but there are some comments that have to be made on it. (a) It rests on the familiar but now exploded formula⁶ that a third party cannot sue in tort in respect of conduct which amounts to a breach of contract between two others. The decision in *Donoghue v. Stevenson*⁷ does not apply to the lease or sale of real estate⁸ but deprives this formula of its validity. For instance, it has now been held that a contractor who negligently performs his duty to erect or repair a building and thereby creates a danger may be sued not merely

1. This appears to be implied in cases like *Robbins v. Jones*, (1863) 15 C.B.N.S. 221, 240, *per* Erle, C.J.

2. Restatement, II, § 359; cf. *Heaven v. Pender*, (1883) 11 Q.B.D. 503; *Kelly v. Woolworth*, (1922) 2 Ir. R. 5 (hiring of dining rooms for whist drive and dance).

3. (1906) A.C. 428; (1905) 2 K.B. 757; see also *Cameron v. Young*, (1908) A.C. 176; *Ryall v. Kidwell*, (1914) 3 K.B. 135; *Bromley v. Mercer*, (1922) 1 K.B. 126; *Tredway v. Makin*, (1904) 20 T.L.R. 726.

4. (1933) 1 K.B. 551; cf. *Hiramanack v. Balkishen*, 1934 Lah. 931. The decision in *Cunard's case* is consistent with the cases in notes 4 and 5 at p. 413 above; see also Salmond, Torts, p. 540; *Taylor v. Liverpool Corporation*, (1939) 3 A.E.R. 329. But see *Shirvell v. Hackwood Estates*, (1938) 2 A.E.R. at pp. 7-8, *per* Greer, L.J.

5. The rule in the U.S.A. is otherwise; Restatement, II, § 357.

6. Perhaps also on another time-worn formula that an action does not lie for a 'non-feasance'; 45 Har. L.R. 164. The use of this word here is a mere misnomer.

7. (1932) A.C. 562; below, paras. 57-60.

8. *Otto v. Bolton*, (1936) 2 K.B. 46.

by his employer but by others to whom harm was likely.¹ (b) It appears to be anomalous that a landlord who fails to perform his covenant to repair and thereby creates a danger in his premises should be held liable to an occupier of adjoining property² but not to a person lawfully in the premises. The anomaly is only explained but not justified by the circumstance that the action in the one case is for nuisance and in the other for negligence.³ (c) The immunity of the lessor may not after all be real, as the lessee may be able to recover, in an action against him for breach of contract, the damages which the lessee had to pay to a third party.⁴ A direct remedy against the landlord was allowed in another context to avoid circuity of action and there is no reason why it should not also be allowed here.⁵

37. Duty of the vendor to the vendee and others.—(a) His position is similar to that of the lessor in respect of defects existing at the time of sale. The ordinary rule is *caveat emptor*. The vendor does not, in the absence of express contract, warrant the fitness or safety of the premises sold.⁶ The law as to sale of chattels is different, as will be seen later.⁷ But he is bound to disclose to the buyer any latent defects which he knew and the buyer did not know and could not with reasonable care discover.⁸ A vendor or builder of a house built by him with materials which to his knowledge are unfit and will create a latent danger not discoverable on reasonable inspection, would seem to be liable for injury resulting therefrom, to the vendee or even a third person like the vendee's wife, child or guest.⁹ (b) The vendor would in no case be liable to the vendee or others in respect of dangers arising after the sale.

ILLUSTRATION.

Vendor not Liable. *Bottomley v. Bannister*:¹⁰ The defendants were builders who had built several houses similar in design on their land and having a gas-burner which properly regulated, required no flue. They sold one of their houses to one C.B. who

1. *Brown v. Cotterill*, (1934) 51 T.L.R. 21; cf. *Collis v. Selden*, (1863) L.R. 3 C.P. 495 at p. 498; as to dangerous works, see *Parry v. Smith*, (1879) 4 C.P.D. 325; *Dominion Natural Gas Co. v. Collins*, (1909) A.C. 640; *City of Birmingham Tramways Co. v. Law*, (1910) 2 K.B. 965.

2. Above, Chap. VI, para. 59; or if the properties were different flats of the same building; *Cunard v. Antifyre, Ltd.*, (1933) 1 K.B. 551. The liability is higher if the house adjoins a highway; *Wilchick v. Marks*, (1934) 2 K.B. 56; above, Chap. VI, para. 8.

3. *Per* Talbot, J., in (1933) 1 K.B. at pp. 558, 561.

4. *The Kate*, (1935) P. 100. See also *Bentley Bros. v. Mettalf & Co.*, (1906) 2 K.B. 548.

5. Above, Chap. VI, para. 59.

6. *Bottomley v. Bannister*, (1932) 1 K.B. 453; *Otto v. Bolton*, (1936) 2 K.B. 46. See Annual Survey, 1930, p. 171; Winfield, Law of Tort, p. 589.

7. Below, para. 54. 8. T. P. Act, S. 55. (1) (a).

9. Restatement, II, §§ 353, 375. See also *Miller v. Cannon Hill Estates*, (1931) 2 K. B. 113; *Brown v. Cotterill*, (1934) 51 T.L.R. 21. Cf. *Otto v. Bolton*, (1936) 2 K. B. 46.

10. (1932) 1 K.B. 458.

entered into possession. On a certain day *C. B.* and his wife were found dead in the bath-room, having been poisoned by carbon-monoxide. An action by their representatives was disallowed on the ground that the burner if properly regulated was not dangerous and even if it was, the danger was known as much to the purchaser as to the defendants and that the burner was regulated properly by a gas company acting for the purchaser and the regulation must have been altered by him or his wife.

38. Duty arising from possession and ownership of chattels.—The duty of a person who keeps dangerous animals has already been discussed.¹ The following cases may be considered here : (a) Possession and management of a carriage, (b) Possession and management of a dangerous chattel, and (c) Delivery of a dangerous chattel to another.

39. Duty of a person in possession and management of a carriage.—The duty of a person in possession and management of a carriage² or other vehicle may arise : (a) in respect of the safety of goods entrusted to him, (b) in respect of the safety of a passenger, and (c) in respect of the safety of persons outside the carriage.

40. Duty of a carrier in respect of goods entrusted for carriage.—The duty of a person who is not a common carrier, in respect of goods entrusted to him for carriage is that of a bailee as defined in the Indian Contract Act,³ viz., to take as much care of the goods bailed as a reasonable person of prudence would take of his own goods under the circumstances. The onus is on the carrier or bailee to prove that he took reasonable care. The duty may be higher by reason of the express terms of the contract of carriage.⁴ The absolute liability of common carriers will be noticed later.⁵ The duties of railway companies and carriers by land or sea⁶ are governed by statute in England and India.

41. Duty of a carrier to a passenger.—The word 'carrier' is used here in the sense of a person in possession or control of the carriage or other vehicle. A passenger is a person who has the carrier's permission, express or implied, to enter or use the carriage. The duty of the carrier in respect of the safety of the passenger arises by reason of these two facts, viz., the carrier's control of the carriage and his permission of the passen-

1. Above, Chap. VI, paras. 68-72.

2. *Quare*, whether it includes vertical carriage, e.g., a lift, as well as horizontal, *Haseldine v. Daw & Son, Ltd.*, (1941) 2 K.B. 343 C.A. 3 Ss. 151, 152.

4. The duty cannot be lowered; Indian Contract Act, s. 152; *Sheik Mahamad Ravuther v. British India Steam Navigation Co.*, (1908) 1 L.R. 32 Mad. 95; *Fagan v. Green*, (1926) 1 K. B. 102. If there are conditions in the contract of carriage excluding or limiting liability, they must have been brought to the notice of the party concerned; e.g., *Parker v. S. E. Ry. Co.*, (1877) 2 C.P.D. 460; *Thompson v. L. M. & S. Ry.*, (1930) 1 K.B. 43; for a case of such conditions in a case of hire of deckchairs, see *Chapleton v. Barry*, *U. D. C.*, (1940) 1 K.B. 532.

5. Below, Chap. XV, para. 5.

6. As to international air-carriage, see *The Carriage by Air Acts*, above, Chap. II, para. 11.

ger's use of it. The duty is therefore independent of contract or any reward paid or promised.¹ If there is a contract, the plaintiff has the option of suing either for its breach or for a tort.

42. Carrier's control over the carriage.—The duty does not attach to a person who has no present control,² e.g., the manufacturer or seller of the carriage, or a person who let it on hire. But if a person has the control, he is liable though he had no contract with the passenger to carry him. In *Foulkes v. Metropolitan District Ry. Co.*³ the plaintiff purchased a return ticket in a station belonging to the South Western Railway Co., and on his return journey to that station was conveyed in a train belonging to the defendants, the Metropolitan District Railway Co., which had running powers on the lines of the South Western Railway Co., and divided the profits with it. He was injured by reason of the defendants' carriage being unsuitable to the platform at that station. It was held that he could recover though he had no contract with the defendants. In cases of through booking of passengers by one railway company for journeys over lines of other companies, a passenger has a remedy against the company over whose lines the loss or injury occurs.⁴ In these cases he has also a remedy for breach of contract against the carrier with whom he contracted.

43. Permission of the passenger's use of the carriage.—Again, the defendant's permission of the plaintiff's use of the carriage is necessary to create the duty. The permission may be express or implied and may exist though there is no reward or fare paid by the plaintiff. A friend taken by the owner of a car can sue the latter for neglect of duty in respect of the condition of the car or the manner of its use.⁵ A child allowed to travel free of charge with its mother or caretaker in a railway train can sue for injury due to the carrier's negligence.⁶ So can a newspaper reporter, a police or postal official allowed to travel free of charge.⁷ A servant whose ticket is purchased by his master can sue the railway company.⁸ Non-payment of fare would ordinarily negative permission but sometimes it

1. *Foulkes v. Metropolitan Dt. Ry. Co.*, (1880) 4 C.P.D. 267; *Kelly v. Metropolitan Ry. Co.*, (1895) 1 Q.B. 944; *Taylor v. M. S. & L. Ry. Co.*, (1895) 1 Q.B. 134.

2. *Caledonian Ry. Co. v. Mulholland*, (1898) A. C. 216. Cf. *Fosbrooke-Hobbes v. Airwork, Ltd.*, (1937) 1 A.E.R. 108 (*A* got *B* to hire an aeroplane for *A* and a party of guests; *B* hired one of *C* whose pilot's negligence resulted in death of a guest; held, the widow of the deceased could recover from *C* but not from *B*).

3. (1880) 4 C.P.D. 267. See also *Dalyell v. Tyrer*, (1858) E.B. & E. 899.

4. *G. W. Ry. Co. v. Blake*, (1867) 7 H. & N. 987; *Buxton v. N. E. Ry. Co.*, (1868) L.R. 3 Q.B. 549; Indian Railways Act, s. 80.

5. *Harris v. Perry*, (1903) 2 K.B. 219; *White v. Steadman*, (1913) 3 K.B. 340.

6. *Austin v. G. W. Ry. Co.*, (1867) L.R. 2 Q.B. 442; but not a child in its mother's womb, *Walker v. G. N. Ry. Co.*, (1891) 28 L.R. Ir. 69.

7. *G. N. Ry. Co. v. Harrison*, (1854) 10 Ex. 376; *Collett v. L. & N. W. Ry. Co.*, (1831) 16 Q.B. 984.

8. *Marshall v. Y. N. & B. Ry. Co.*, (1851) 11 C.B. 655.

may not.¹ In *Austin v. G. W. Ry. Co.*,² a child just over three years of age was taken by the mother without a ticket though the Railway Act required payment of half the full fare for children between three and twelve years of age. It was held that the child could recover against the railway company for personal injury, because the duty was independent of contract and arose towards the child travelling as a passenger without any design on the part of any person to defraud the railway company. If, of course, there is any fraud or unlawful object in the passenger using the carriage, then he is a trespasser and the duty to use care does not exist towards him.³ As the duty towards the person who is permitted to travel⁴ is independent of contract, a breach of it may give rise to an action at the instance of a third person who is injured thereby, *e.g.*, a master who sustains loss of service by injury to a servant due to the negligence of a railway company.⁵ It is open to a passenger of full age to agree to travel at his own risk or limit the liability of the carrier⁶; but the carrier must prove that the conditions limiting his liability were brought to the notice of the passenger when he entered into the contract.⁷

44. Extent of a carrier's duty to a passenger.—(a) In the first place, the duty of a carrier is to use reasonable care and skill to provide a safe, strong and sufficient carriage.⁸ He is bound to inspect the carriage and ascertain defects from time to time and remove them.⁹ But he is not liable for harm due to defects undiscoverable with due care on the part of

1. *Dearden v. Townsend*, (1865) L.R. 1 Q.B. 10; *Austin v. G. W. Ry. Co.*, above; *Bentham v. Hoyle*, (1878) 3 Q.B.D. 239.

2. (1867) L.R. 2 Q.B. 442.

3. *G. T. Ry. Co. v. Burnett*, (1911) A.C. 361; *Lygo v. Newbold*, (1854) 9 Ex. 302; *Ismail v. B. B. & C. I. Ry.*, 1932 Bom. 452.

4. The same duty exists towards persons who go to the carrier's premises on business, *e.g.*, to see a passenger off; *Thatcher v. G. W. Ry. Co.*, (1893) 10 T.L.R. 13; *Toal v. N. B. Ry. Co.*, (1908) A.C. 352 (a person standing on the platform injured by the door of a carriage which started without the door being bolted).

5. *Allon v. Midland Railway Co.*, (1865) 19 C.B.N.S. 213, which held *contra*, is now disregarded; see *Meux v. G. E. Ry. Co.*, (1895) 2 Q.B. at pp. 391, 394; *Berringer v. G. E. Ry. Co.*, (1879) 4 C.P.D. 163.

6. *MacCawley v. Furness*, (1872) L.R. 8 Q.B. 57; *Grand Trunk Ry. Co. v. Robinson*, (1915) A.C. 740; *Canadian Pacific Ry. Co. v. Parent*, (1917) A.C. 195; as to sea carriers, see *O'Brien v. Oceanic Steam Navigation*, (1914) 3 K.B. 731; *Hood v. Anchor Line*, (1918) A.C. 837.

7. *Richardson v. Rowntree*, (1894) A.C. 217; *Henderson v. Stephenson*, (1875) L.R. 2 H.L. (Sc.) 470; cf. *Harris v. G. W. Ry. Co.*, (1876) 1 Q.B.D. at p. 530; *Thompson v. L. M. & S. Ry. Co.*, (1930) 1 K.B. 41; *Penton v. Southern Ry.*, (1931) 2 K.B. 103; *Fasbroke-Hobbes v. Airwork, Ltd.*, (1937) 1 A.E.R. 108; *Sugar v. L. M. & S. Ry. Co.*, (1941) 1 A.E.R. 172.

8. *Elliott v. Hall*, (1885) 15 Q.B.D. 315; *Smith v. Steele*, (1875) L.R. 10 Q.B. 125; *Hyman v. Nye*, (1881) 6 Q.B.D. 685. As to carriage in a lift, see *Haseldine v. Daw & Son, Ltd.*, (1941) 2 K.B. 343 C.A.

9. *Bremner v. Williams*, (1829) 1 C. & P. 414; *Grote v. Chester & Holyhead Ry. Co.*, (1848) 2 Ex. 257; *Murphy v. Phillips*, (1876) 35 L.T. 477; *Marney v. Scott*, (1899) 1 Q.B. 986.

himself, his servants or contractors.¹ His duty is analogous to that of an occupier of premises to an invitee² or a paying guest³ and is higher than the occupier's duty to a licensee because permission to use a carriage involves greater risks than permission to enter premises.⁴ (b) Secondly, he is bound to use due care to provide proper and skilled drivers and necessary equipment and to take precautions against harm arising from the use of the carriage. Such precautions are sometimes enacted by statute, e.g., provision of a communication chain in a railway carriage,⁵ of supply of medicines on board a ship.⁶ But there is no liability where there is no want of due care. In a Calcutta case,⁷ the Privy Council held that a passenger injured by explosives carried by a fellow passenger could not recover against the railway company because the defendant's servants had no reason to suspect their existence in the luggage carried by that person. While the duty aforesaid is independent of contract, other duties may be wholly contractual, e.g., to reach the destination at a particular time or by a particular route. (c) Thirdly, the duty of the carrier or other person in control of the carriage is to use due care and caution in driving and otherwise managing it.⁸ Here again, the carrier is not an insurer against accident but is liable only for negligence,⁹ whether the carriage is by land,¹⁰ sea¹⁰ or air.¹¹ The degree of care and skill would vary with the facts. Much greater care is required in driving in a crowded street than in an unfrequented one, in driving a fast vehicle like a motor car than an animal-drawn waggon, in the crew of a ship who must keep a look-out for miles than in the driver of a carriage who

1. *Readhead v. Midland Ry. Co.*, (1869) L.R. 4 Q.B. 379; see also *Moffat v. Bateman*, (1876) L.R. 3 P.C. 115; *Richardson v. G. E. Ry. Co.*, (1876) 1 C.P.D. 342; *Newberry v. Bristol Tramways*, (1913) 107 L.T. 801; *Jewan Ram v. E.I.Ry. Co.*, (1924) 1 L.R. 51 Cal. 861.

2. *Indermaur v. Dames*, (1866) L.R. 1 C.P. 274.

3. *Francis v. Cockrell*, (1870) L.R. 5 Q.B. 501.

4. *Harris v. Perry*, (1903) 2 K.B. at p. 225, per Collins, M.R. See however *Huseldine v. Daw & Son, Ltd.*, (1941) 2 K.B. 343 C.A.

5. Indian Railways Act, s. 62. See *Blamares v. L. & Y. Ry. Co.*, (1873) L.R. 8 Ex. 283.

6. Merchant Shipping Act, 1894 (58 and 59 Vict. c. 60), s. 298; M.S. Act. 1906, s. 17; *Couch v. Steel*, (1854) 3 E. & B. 402; *Brocklebank, Ltd. v. Noor Ahmode*, 1940 P.C. 225. See also *The Saint Angus*, (1938) P. 225 (shipowner held liable for non-provision of adequate crew with the result that when the navigating officer fainted, a collision occurred.)

7. *E. I. Ry. Co. v. Kalidas Mukerjee*, (1901) 1 L.R. 28 Cal. 401 (P.C.). See also *Vishnu v. B. B. & C. I. Ry. Co.*, (1923) 25 Bom. L.R. 881.

8. See *Mottram v. South Lancashire Transport Co.*, (1942) 2 A.E.R. 452 (conductress of bus not bound to go down on the platform to see passengers alight safely). Cf. *Shrimpton v. Herts C. C.*, (1911) 104 L.T. 145, 147 (H.L.): in C.A. 74 Sol. J. 305 (school authority liable for running omnibus for children without a conductor for guiding them in and out of the bus).

9. *Elliott v. Hall*, (1885) 15 Q.B.D. 315. As to the duty of a driver of a railway engine to whistle, see *B. N. Ry. Co. v. Taraprasad*, (1927) 48 C.L.J. 45.

10. *The Shannon*, (1842) 1 W. Rob. 463; *The Marpesia*, (1872) L.R. 4 P.C. 212 (accident due to darkness).

11. Above, Chap. II, para. 11.

does enough if he looks ahead for yards.¹ The degree of care is defined by statute in particular cases. Thus we have the rules of the road, *e.g.*, that a driver must keep to the left,² overtaking ordinary vehicles by passing by their right and enabling them to keep to the left of the road,³ and when overtaking tram-cars pass them on by their left,⁴ wait and look out when entering a main road from a cross-road.⁵ There are also special regulations as to speed, lights, etc., in the case of motor cars.⁶ Similarly there are regulations to avoid maritime collisions,⁷ *e.g.*, when a ship sights another coming in the opposite direction, it must stop and reverse.⁸ Non-compliance with rules of this description is usually a punishable offence, and will be *prima facie* evidence of negligence, the weight of which will vary in each case.⁹ Driving on the wrong side of the road is not *per se* negligence or conclusive evidence thereof. Sometimes it may be excusable where the road is broad and there is little traffic,¹⁰ and may be even obligatory if a collision is thereby to be avoided.¹¹ In any case it makes it the duty of the driver to keep a better lookout.¹² Similarly an improper speed¹³ or absence of lights¹⁴ is *prima facie* evidence of negligence. Driving a bus when there is an obstruction by an overhanging branch of a tree on the road is clearly negligence. When by doing so the branch brushed against the bus and caused the windows to break with the result that a splinter of broken glass penetrated the eye of a child on the top of the bus, the child was allowed to recover damages.¹⁵

1. *The Khedive*, (1880) 5 A.C. at p. 891.

2. Highways Act, 1835, s. 78; left does not mean the extreme left but only left of the centre; *Bolton v. Everett*, (1911) 75 J.P. 534; *Sleith v. Godfrey*, (1920) 90 L. J. K. B. 193. The rule is the opposite in France, Germany and the United States.

3. *Mayhew v. Boyce*, (1816) 1 Stark. 423; *Nuttall v. Pickering*, (1913) 1 K.B. 14.

4. *Jardine v. Stonefield Laundry Co.*, (1887) 14 Rettie, 839.

5. Halsbury, Laws of England, Vol. 21, p. 413; *Williams v. Richards*, (1852) 3 C. & K. 81.

6. The Road Traffic Act, 1930 (21 and 22 Geo. 5, c. 43).

7. Regulations for the Prevention of Collisions at Sea (1910) made under S. 418, of the Merchant Shipping Act, 1894.

8. *The Khedive*, above; see also *The Bremen*, (1931) P. 166.

9. *Sooniram Ramniranjandas v. Gopalakrishnan*, 1937 Rang. 519 (motor car on the wrong side colliding with motor cycle on right, held motor car driver was answerable); *Bangalore Printing & Publishing Co. Ltd. v. M. K. Murty*, 45, Mys. H. C. 166. Mere compliance may not sometimes suffice but extra precautions may be required; *Croston v. Vaughan*, (1938) 1 K.B. 540; *Joseph Eva Ltd. v. Reeves*, (1938) 2 K.B. 393 C.A.

10. *Lloyd v. Ogleby*, (1859) 5 C.B.N.S. 667; *Chaplin v. Howes*, (1828) 5 B. & C. 554.

11. *Clay v. Wood*, (1803) 5 Esp. 44.

12. *Pluckwell v. Wilson*, (1832) 5 C. & P. 375; *J. K. Rau v. Davey*, 1936 Mad. 195.

13. *Nani Balu Sen v. Auckland Jute Co.*, (1925) I. L. R. 52 Cal. 602; *Ram Sawak v. Emp.*, 1933 Oudh. 391. See *Knight v. G. W. Ry.*, (1943) 1 K. B. 105 (30 miles p. h. for a railway train in a foggy morning over a level crossing is not too much).

14. *Wintle v. Bristol Tramways Co.*, (1917) 86 L. J. K. B. 936.

15. *Ridley v. London Passenger Transport Board*, (1942) 1 A.E.R. 433.

45. Duty of a carrier to persons outside the carriage.—The duty of a carrier or other person in control of a vehicle towards persons outside it *e.g.*, those on the road, is to take reasonable care in respect of its fitness for the road and in driving or otherwise managing it. All persons whether adults, children, infirm or paralytic are entitled to use the road and expect reasonable care from those in charge of carriages¹; but they are not entitled to more.² The principles already mentioned as regards the duty of the carrier towards a passenger in the matter of driving the carriage will apply here also. It was held to be negligence to leave a cart and horse unattended in a street,³ a motor lorry unattended on a steep incline so that it could start of itself⁴ or be started by a child,⁵ to use a cart without proper tackle so that it broke down on the way,⁶ or a motor car with a worn steering gear,⁷ or to use an unbroken horse on a crowded road.⁸ It is not negligence merely to lead cattle along a street without halters⁹ or without light on a dark night,¹⁰ to leave a motor lorry on the road which is started by some meddlers and is run against a shop,¹¹ or to use a heavy lorry which skids on the road.¹²

46. Possession and management of dangerous chattels.—The duty of a person who brings on his land things which are dangerous by their tendency to escape and cause harm thereby is, as we have seen, higher than a duty to use care to avoid such harm.¹³ We are here concerned with things which are dangerous without any tendency to escape and cause harm. The duty of a person in possession of such a chattel would be to take due care to avoid harm to another, if he knew or from facts within his knowledge should have realised that harm to the latter was likely. The duty may be in particular cases to give warning of the danger, and in others to take precautions against harm resulting from the interference, wilful, careless or

1. *Per* Lord Denman in *Foss v. Litton*, (1832) 5 C. & P. 407, 409.

2. (1875) L.R. 10 Ex. 261.

3. *Illidge v. Goodwin*, (1831) 5 C. & P. 190; *Lynch v. Nardin*, (1841) 1 Q.B. 29; cf. *Donovan v. Union Cartage Co., Ltd.*, (1933) 2 K.B. 71, below, para. 88.

4. *Hambrook v. Stokes Bros.*, (1925) 1 K.B. 141; *Parker v. Miller*, (1926) 43 T.L.R. 408.

5. *Martin v. Stanborough*, (1924) 41 T.L.R. 1, but not if started by adults; *Kuoff v. Long & Co.*, (1916) 1 K.B. 143.

6. *Welsh v. Lawrence*, (1818) 2 Chit 262, as explained by McCardie, J., in *Phillips v. Britannia Hygienic Laundry*, (1923) 1 K.B. 539.

7. *Hutchins v. Maunder*, (1920) 37 T.L.R. 72.

8. *Hammack v. White*, (1862) 11 C.B.N.S. 588.

9. *Tillett v. Ward*, (1882) 10 Q.B.D. 17; cf. *Pinn v. Keen*, (1916) 32 T.L.R. 451.

10. *Catchpole v. Minister*, (1914) 109 L.T. 951.

11. *Kuoff v. Long*, (1916) 1 K.B. 148.

12. *Wing v. L.G.O. Co.*, (1909) 2 K.B. 652; *Parker v. L.G.O. Co.*, (1909) 101 L.T. 623. Subsequent improvements in motor omnibuses appear to have made the question of skidding of small practical importance in England; Mahaffy and Dodson on the Law of Motor Cars, p. 57.

13. Above, Chap. VI, para. 64.

otherwise, of third parties.¹ In *Dixon v. Bell*,² the defendant sent a young and immature girl-servant to fetch a loaded gun from his house and sent instructions to his friend in the house to take out the priming first before giving the gun to the girl. The friend did so and sent the gun through her. She pointed it in fun at the plaintiff's son and pulled the trigger. The gun went off because some powder was still left, and the plaintiff's son was seriously hurt. It was held that the defendant was liable as he ought to have rendered the gun harmless before allowing the girl to handle it. In *Williams v. Eady*,³ a schoolmaster who kept a bottle of phosphorus in a room where the pupils' cricketing things were kept was held liable for injuries caused to a boy by another having carried off the bottle to the playground where it exploded. But it was held that there was no negligence on the part of a schoolmaster merely on the ground that a boy while passing from one room to another was hit in the eye by a golf ball played by another from the playground. The injury did not necessarily imply any such lack of supervision on the part of the schoolmaster as would amount to a breach of duty.⁴ Similarly it was held that where a schoolmaster sent an oil can through a pupil to be taken to another room and another boy ran against that pupil and hurt his eye, it was held that there was no negligence on the part of the schoolmaster and the school authority could not be held liable for the injury.⁵ The above duty would not arise in the case of a person who without negligence was unaware of the dangerous character of the article.

47. 'Intrinsically dangerous things'.—As many of the cases under this head relate to dangerous things like firearms, explosives or poisons, it has been usual to speak of a duty in respect of things which are "intrinsically dangerous" or "dangerous in themselves."⁶ These phrases are vague and by no means self-evident and do not signify any logical or legal classification.⁷ "There is an element of danger in every chattel."⁸ Scrutton, L. J., said, "Personally, I do not understand the difference

1. *N. W. Utilities Ltd. v. London Guarantee and Accident Co., Ltd.*, (1936) A.C. 108; *Secretary of State v. Nagorao*, I.L.R. 1943 Mad. 511.

2. (1816) 5 M. & S. 198; see also *Sullivan v. Creed*, (1904) 2 Ir. R. 317 C.A.; *Beebe v. Sales*, (1916) 32 T.L.R. 413; *Burfit v. Kille*, (1939) 2 K.B. 743.

3. (1893) 9 T.L.R. 637; 10 T.L.R. 41 C.A.; see also *Shepherd v. Essex, C. C.*, (1913) 29 T.L.R. 303.

4. *Langham v. Governors of Wellingborough School*, (1932) 101 L.J.K.B. 513. See also *Rawsthorne v. Otley*, (1937) 3 A.E.R. 902.

5. *Wray v. Essex, C. C.*, (1936) 155 L.T. 494.

6. *Dominion Natural Gas Co. v. Collins*, (1909) A.C. 640, 646. Possession of such goods may also be a public nuisance or a breach of statutory regulations.

7. *Donoghue v. Stevenson*, (1932) A.C. at p. 595, per Lord Atkin. See however *Glasgow Corporation v. Muir*, (1943) 2 A.E.R. at p. 52, per Lord Wright.

8. *Oliver v. Sadder*, (1929) A.C. at p. 599, per Lord Dunedin. A boiler in a kitchen is dangerous if gas is not properly regulated but not otherwise; *Bottomley v. Bannister*, (1932) 1 K.B. 458.

between a thing dangerous in itself, as poison, and a thing not dangerous as a class, but by negligent construction dangerous as a particular thing. The latter, if anything, seems the more dangerous of the two; it is a wolf in sheep's clothing instead of an obvious wolf."¹ In the above case of the golf ball,² it may become a dangerous chattel if to the knowledge of the school-master similar injuries had occurred before or were likely to occur. A motor car is not a dangerous thing in the hands of a competent driver but it is otherwise if it is entrusted to an immature or incompetent person. Drinking water is a necessity but when passed through a lead pipe may become dangerous for consumption.³ It is therefore preferable to treat cases like *Dixon v. Bell* as merely illustrative of the duty that may arise in respect of dangerous chattels in general. Another objection to the use of these phrases is that they seem to suggest that the duty of care here discussed is peculiar to things like poisons or explosives which are dangerous to human life and has no application to other things which cause injuries short of endangering life. There is a duty of care in both cases but it may involve different degrees of care and the range of persons to whom it is owed may be wider in cases where the danger is of greater gravity.⁴

48. Delivery of a dangerous chattel to another.—Where a person delivers a chattel to another, the control of it passes to the latter and the duty is on him to use care to avoid harm to himself or others. The person who delivers it would ordinarily not be liable for harm arising from it after he has lost control over it. But in certain cases there may be a duty on his part (a) to the person to whom he delivers it, and (b) to a third person.

49. Duty to the person to whom a dangerous chattel is delivered.—The duty varies with the position of the party receiving the chattel. He may be a mere donee or gratuitous bailee, or may have a business interest in the delivery like a hirer, consignee or purchaser. The duties to these persons may be considered.

50. Duty to a donee or gratuitous bailee.—The duty is to abstain from fraud, *i.e.*, to disclose or give warning of defects of which the donor or bailor is aware.⁵ Therefore knowledge is essential to his liability.⁶ It may be inferred from means of knowledge.⁷ A manufacturer of an article who uses material which to his knowledge is unfit or insecure cannot be

1. *Hodge & Sons v. Anglo American Oil Co.*, (1922) 12 Ll L. Rep. 183 at p. 187. See also *Parker v. Olexo, Ltd.*, (1937) 3 A. E. R. 523, 528, *per* Hailbery, J.

2. Above, page 422, note, 4.

3. *Barnes v. Irwell Valley Water Board*, (1939) 1 K.B. 21.

4. (1932) A.C. at p. 596, *per* Lord Atkin.

5. Indian Contract Act, s. 150; *Coughlin v. Gillison*, (1899) 1 Q. B. 145.

6. (1899) 1 Q.B. at p. 147. See also *Pattenden v. Benay*, (1933) 50 T.L.R. 10.

7. *White v. Steadman*, (1913) 3 K.B. 340 at p. 348.

heard to say that he was ignorant of the danger or defect in the article that he has made. A chemist who compounds a medicine for another though gratuitously would be liable if by want of care he used the wrong drug and injured the latter.¹ In the absence of knowledge, the donor or bailor is under no duty to a donee or gratuitous bailee to take reasonable care to ascertain latent defects of which he is not aware. The former would not also be liable where the danger was obvious or he had reason to expect that it was known to the latter.² The duty here discussed is analogous to that of an occupier of premises to a licensee.³

51. Duty to a person having a business interest in the delivery.—A person who delivers a chattel to another having a business interest in the delivery, may owe a higher duty to the latter, if the latter reasonably relies on his skill and care in respect of the condition of the article. The duty would in that case be not merely to abstain from fraud, but also to take due care that the article is reasonably fit for the purpose for which it is delivered.⁴ It would be similar to the duty of an occupier of premises towards an invitee on business or for payment, or of a carrier who invites or permits another to use or travel in his carriage. Where there is a contract for the supply or delivery of a chattel, the duty may be regarded as contractual, but is none the less also independent of contract. The following cases may be considered.

52. Duty to a hirer.—The duty of a person who lets an article on hire is to use reasonable care to find out defects and warn the hirer. He cannot plead ignorance.⁵ In *Hyman v. Nye*,⁶ the plaintiff hired of the defendant, a job master, for a specified journey, a carriage, a pair of horses and a driver. During the journey, a bolt in the under-part of the carriage broke and the plaintiff was injured. It was held that the defendant could have known of the defect and was liable either for a breach of contract or a tort.

53. Duty to a carrier or consignee.—A similar duty arises in the case of consignment of goods to a carrier. A consignor of goods is bound not merely to communicate to the carrier defects in them which are known to him⁷ but also to take due care to see that they are fit for carriage.⁸

1. Clerk & Lindsell, Torts, p. 274.

2. *McCarthy v. Young*, (1861) 6 H. & N. 329 (loan of a weak scaffolding).

3. Above, para. 24. 4. *Heaven v. Pender*, (1883) 11 Q.B.D. at p. 515.

5. Indian Contract Act, s. 150.

6. (1881) 6 Q.B.D. 685, 689, *per* Lindley, J.; see also *White v. Steadman*, (1913) 3 K.B. 340.

7. *Farrant v. Barnes*, (1862) 11 C.B.N.S. 553 (a carboy of nitric acid); *Williams v. E. I. Co.*, (1802) 3 East. 192.

8. *Brass v. Maitland*, (1856) 6 E. & B. 470. The law implies an absolute warranty and indemnity of the common carrier, as he is bound to carry goods offered for carriage; *Ramfield v. Goole & Sheffield Transport Co.*, (1910) 2 K.B. 94 C.A.; *G.N.Ry. Co. v. L. E. P. Transport*, (1922) 2 K.B. 742; Indian Railways Act, ss. 59, 107.

54. Duty to a purchaser.—In the case of a sale of goods, the general rule is *caveat emptor*; in the absence of fraud or express warranty, the seller is not liable to the buyer for defects in the goods sold because the buyer usually relies on his own judgment and inspection in buying the goods.¹ But the seller is bound to abstain from deception of the buyer by making a false representation by words or conduct. A breach of this duty amounts not merely to negligence but to the wrong of deceit.² The seller also owes a duty to disclose to the buyer and give warning of defects or dangers which are known to him and are likely to result in physical injury to the buyer or others who use the article. In *Clark v. Army and Navy Co-operative Society*,³ the plaintiff bought a tin of disinfectant powder from the defendants, a co-operative society. The defendants' servants had been instructed by their manager to warn purchasers about taking care in opening them, but did not warn the plaintiff. She opened the tin and the contents flew into her eyes and injured her. It was held that the defendants were liable and their common law obligation was not excluded by the fact that the sale was made free from warranties. It is however open to the seller to show that the buyer took all the risk on himself.⁴ Besides these two duties, the seller owes a contractual obligation amounting to a condition or warranty in certain cases specified by the Sale of Goods Acts.⁵ If there is a breach of this obligation, the buyer is entitled to avoid the contract and reject the goods,⁶ or accept the goods and sue for damages.⁷ In an action for damages⁸ he can recover compensation for any damage like physical injury to himself⁹ or loss caused to him by reason of physical injury to or death of another.¹⁰ Thus a person recovered damages for loss due to the death of his wife from typhoid caused by her taking bad milk supplied to him by the defendant.¹¹ But the condition or warranty is higher than the common law obligation to use reasonable care to supply goods in a fit condition because it extends to defects which the seller could not have discovered with due care.

1. *Jones v. Just*, (1868) L.R. 3 Q.B. 197.

2. *Langridge v. Levy*, (1837) 2 M. & W. 519; above, Chap. IX, para 12.

3. (1903) 1 K.B. 155; see also *Gedding v. Marsh*, (1920) 1 K.B. 668; *Parker v. Oloxo, Ltd.*, (1937) 3 A.E.R. 523.

4. *Ward v. Hobbs*. (1878) 4 A.C. 13.

5. Act III of 1930, s. 16; cf. s. 14 of the English Sale of Goods Act, 1893 (56 and 57 Vict., c. 71).

6. S. 12, Sale of Goods Act.

7. Ss. 13, 59.

8. S. 73, I.C.A.; s. 53 of the English Sale of Goods Act.

9. *Priest v. Last*, (1903) 2 K.B. 148; *Chaproniere v. Mason*, (1905) 21 T.L.R. 633; *Kasler v. Slavouski*, (1923) 1 K.B. 78; *Morelli v. Fitch*, (1928) 2 K.B. 636; *Grant v. Australian Knitting Mills, Ltd.*, (1936) A.C. 85. See *Lockett v. Charles Ltd.*, (1938) 4 A.E.R. 170 (when husband and wife ordered food in a hotel and the wife was taken ill with food-poisoning, the wife could sue on implied contract). See also *Daniels v. White & Sons*, (1938) 4 A.E.R. 252.

10. *Priest v. Last*, (1903) 2 K.B. 148. For a case where the warranty was not established, see *Greenfell v. Merysonitz, Ltd.*, (1936) 2 A.E.R. 313.

11. *Frost v. Aylesbury Dairy Co.*, (1905) 1 K.B. 608; see also *Jackson v. Watson*, (1909) 2 K.B. 193; *Square v. Model Farm Dairies*, (1939) 1 A.E.R. 259 C.A.

Thus in *Randall v. Newson*,¹ the plaintiff ordered and bought of a coach-builder a pole for the plaintiff's carriage. The pole broke in use and the horses became frightened and were injured. It was held that the pole was not reasonably fit for the carriage and the defendant was liable though there was no negligence on his part. There is no direct authority in England on the question whether there is also a duty of the seller independent of contract or warranty to take due care to ascertain defects or dangers and prevent harm to the buyer who reasonably relies on the seller's care and skill.² In *Donoghue v. Stevenson*,³ to be presently considered, a seller who is also a manufacturer of an article has been held to owe a duty to a person other than the buyer to prevent harm arising from his negligence in manufacturing it. It would therefore follow that he owes at least the same duty to the buyer also. The buyer cannot of course complain when he has had a reasonable opportunity of inspection and discovering the danger. A retail dealer may not be bound to examine the goods sold by him, *e.g.*, to analyse tinned salmon⁴; it would be otherwise if he dealt in dangerous goods like explosives.

55. Duty to persons other than the one to whom a dangerous chattel is delivered.—A person who delivers or supplies a dangerous chattel to another may owe a duty also to third persons to avoid harm arising to them, if he as a reasonable man should have realised that such harm was likely. If he knew of the danger or defect in the chattel or from facts in his knowledge should have realised it, he is bound to give warning of the danger to the recipient.⁵ The danger may be so great that a warning may not be enough and the duty may extend to the taking of precautions against the mischief or neglect of the recipient or even of third parties. A person who sends a loaded gun through a child cannot disown responsibility for the harm due to the mischief of that child or any other child who gets hold of it.⁶ A person who in pursuance of a contract delivers a chattel to another may owe besides a contractual duty to the latter a duty independent of contract to third persons to take reasonable care to ascertain any latent danger in the chattel and prevent harm arising from it. Thus a vendor or

1. (1877) 2 Q.B.D. 102. A similar condition is implied in the case of supply of materials in the course of a contract to do work or repair; *Myers & Co. v. Brent Cross Service Co.*, (1934) 1 K.B. 46; *Malfrout v. Nozal*, (1935) 51 T.L.R. 551.

2. The Restatement affirms the duty in respect of bodily harm; II, § 401.

3. Below, para. 57. See *Barnes v. Irwell Valley Water Board*, (1939) 1 K.B. 21; above, para. 47; *Read v. Croydon Corporation*, (1938) 4 A.E.R. 631.

4. *Gordon v. McHardy*, (1903) 6 F. 210.

5. Above, para. 46. See also *Thomas v. Winchester*, (1852) 6 N.Y.R. 397; cited with approval in *Dominion Natural Gas Co. v. Collins* (1909) A.C. at p. 646; *Anglo-Celtic Shipping Co. v. Elliot*, (1925) 42 T.L.R. 297 (manufacturer of 'pluperfect liquid,' a dangerous substance, held liable to a person other than the buyer); *Parker v. Oloxo, Ltd.*, (1937) 3 A.E.R. 523.

6. *Dixon v. Bell*, above, para. 46.

manufacturer of a dangerous chattel may in certain circumstances become liable for injury to other persons than the buyer.

56. Law before *Donoghue v. Stevenson*.—On this point the case-law in England before 1932 presented a great deal of uncertainty and difficulty. While certain decisions¹ recognised such liability, there were several others² which denied it. There was especially a large volume of dicta of eminent judges in support of the latter class of cases. They applied the doctrine that a person who is not a party to a contract cannot found a cause of action on a breach of it and reached the result that a vendor or manufacturer of a dangerous chattel cannot be liable to any person other than his immediate buyer for injury due to his want of care.³ They admitted two exceptions to this rule: (a) where the deliverer is guilty of fraud in delivering a dangerous chattel with knowledge of the danger; (b) where the chattel belongs to the class of 'intrinsically dangerous goods.'

57. *Donoghue v. Stevenson*.—The above views have become obsolete on account of the famous decision of the House of Lords in *Donoghue v. Stevenson*⁴ in 1932. There it was held that the manufacturer of an article could be held liable to a person other than the immediate buyer for injury arising from a latent defect due to his want of care. In that case the defendant was a manufacturer of aerated waters. One of the bottles of ginger-beer supplied by him to a retailer contained the remains of a dead snail and the plaintiff who had bought the bottle from the retailer complained that she sustained injury by drinking its contents. As the bottle was of dark opaque glass the impurity of its contents could not have been discovered by the consumer or any other dealer through whose hands it passed. The House of Lords held that these facts disclosed a cause of action, i.e., a breach of duty of the manufacturer to the plaintiff. His duty

1. *George v. Skivington*, (1869) 5 Ex. 1 (manufacturer of hair-wash held liable to purchaser's wife); *Heaven v. Pender*, (1883) 11 Q.B.D. 584; above, para. 9½.

2. *Winterbottom v. Wright*, (1842) 10 M. & W. 109; *Longmead v. Holliday*, (1851) 6 Ex. 761; *Earl v. Lubbock*, (1905) 1 K.B. 253; *Blocker v. Lake*, (1912) 106 L.T. 533; *Bates v. Batey*, (1913) 3 K.B. 351; *Mullen v. Barr & Co.*, (1929) S.C. 461 (dead-mouse in ginger-beer bottle injuring consumer, no liability). Many of these cases however turned on defects in pleading or proof of negligence. They are now only of antiquarian interest. For a discussion of them and their historical background, see the first edition, pp. 414 to 418.

3. Notwithstanding this, he may be made to pay damages indirectly to a remote purchaser, through a chain of actions against each immediate supplier; *Wallis v. Pratt*, (1911) A.C. 394; *Jones v. Page*, (1867) 15 L.T.N.S. 619; *Vaughan v. Oulton*, (1899) 79 L.T. 385; *Kasler v. Slavouski*, (1928) 1 K.B. 78; *Parker v. Oloxo, Ltd.*, (1937) 3 A.E.R. 524. If the original supplier has been guilty of want of care, there is no reason for insisting on this multiplicity of proceedings.

4. (1932) A.C. 562, decided by Lords Atkin, Thankerton and Macmillan, Lords Buckmaster and Tomlin, dissenting. For a similar case, see *Lockart v. Barr*, (Ct. of sess.) (1941) S.C. 520 (bottle of lemonade containing phenol, manufacturer held liable to consumer); cf. *Daniels v. White & Sons*, (1938) 4 A.E.R. 258; below, para. 59.

is to take reasonable care that the article supplied by him is free from a defect which the immediate buyer or an ultimate consumer like the plaintiff has no reasonable opportunity to discover by inspection. Lord Atkin summed up a memorable judgment with the following statement of principle.¹

"A manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care."

58. *Scope of the rule in Donoghue v. Stevenson.*—The principle of this case is not confined to articles of food² or drink³ but is of wider application.⁴ In *Grant v. Australian Knitting Mills, Ltd.*,⁵ decided by the Privy Council, it was applied to an article of wear. The plaintiff sued the retailers as well as the manufacturers of woollen garments for damages on the ground that he purchased some woollen pants from the former and contracted a serious cutaneous infection by wearing them, owing to the presence in them of free sulphite, an irritating chemical. It was held that the retailers were liable for breach of warranty and the manufacturers were liable in tort as they were guilty of negligence in making the garments with a latent defect or danger in them not discoverable by reasonable examination. In *Macpherson v. Buick Motor Co.*,⁶ the duty here discussed was affirmed in the United States earlier than it was in England. A manufacturer of a motor car who had purchased the wheels from a reputable maker was held liable to a person who had bought a car from a retailer and was injured by the collapse of a wheel due to defects in it which could have been discovered by the manufacturer by reasonable inspection. If, of course, the defects could have been discovered by the retailer also on such reasonable inspection as is usual or expected from him in the course of business, then the manufacturer may not be liable to the ultimate buyer.⁷ Similarly if the injury was due to the neglect of the injured person himself the

1. (1932) A.C. at p. 599.

2. *Barnett v. Packer & Co. Ltd.*, (1940) 3 A.E.R. 575 (sweets containing a wire and injuring the finger).

3. *Barnes v. Irwell Valley Water Board*, (1939) 1 K.B. 21 C. A. (drinking water); above, para. 47.

4. *Watson v. Buckley*, (1940) 1 A.E.R. 174 (distributors held liable for injury suffered by customer from hair-dye dangerous by reason of neglect of manufacturer).

5. (1936) A.C. 85.

6. (1916) 217 N. Y. 382; L.R.A. 1916 F. 696.

7. But such were not the facts of the N.Y. case; 14 Can. Bar. Review, p. 298. Even in such cases the manufacturer may be liable if he should have contemplated that the defect might be passed on without inspection; Restatement Vol. II, § 393. Cf. *Mowbray v. Merryweather*, (1895) 2 Q.B. 640 (damage to plaintiff's workman not remote in an action for breach of warranty though plaintiff failed to inspect defective rope supplied by defendant); *Vogan v. Oulton*, (1898) 79 L.T. 384; (1899) 81 L.T. 435.

manufacturer or seller cannot be held liable. In *Farr v. Butlers Bros. & Co.*,¹ the defendants, crane manufacturers, sold a crane in parts to a firm of builders. There were defects in some of the parts which were discoverable on reasonable inspection and had as a matter of fact been discovered by an experienced crane inspector. But before the defects had been remedied he began working the crane and a part of it fell on him and killed him. It was held that his widow could not recover. The principle with the limitations above mentioned would also apply to other persons than manufacturers who deliver dangerous chattels to another. A retail dealer may be liable to the ultimate consumer for want of reasonable care on his part to discover latent defects in the goods sold.² A person who lets a dangerous article on hire may have to answer for the harm caused by his negligence to the hirer himself and also his servant, friend, or relation. A consignor of dangerous goods would be liable for injury to the carrier and his servants. A person who is engaged to do repairs on a chattel and by his negligence creates a latent danger in it would be liable not merely in respect to his employer but to any other person who is likely to be injured. Thus a person who had negligently fitted a side-car to a motor bicycle was held liable to the owner of the latter and his wife who were thrown out and injured by the side-car and bicycle parting company on the road.³ If, for instance, the side-car ran against another person on the road, the liability of the repairer to such person cannot also be denied. Therefore the duty of care in respect of a dangerous chattel is not merely to the ultimate buyer or consumer or his servants or relatives but to any person who is likely to be within the area of its injurious action.

59. Essentials of liability under the rule in *Donoghue v. Stevenson*.—It is hardly necessary to add that there can be no liability if there is no proof of want of reasonable care on the part of the deliverer of a chattel in failing to ascertain the latent defect⁴ or to inform the recipient

1. (1932) 2 K.B. 606.

2. See Restatement, Vol. II, § 400 (e.g., a retailer who puts out as his own product a chattel manufactured by another).

3. *Malfoot v. Nozal*, (1935) 51 T.L.R. 551; see also *Brown v. Cotterill*, (1934) 51 T.L.R. 21; above, para. 36; *Howard v. Furness Houlder, Ltd.*, (1936) 2 A.E.R. 781; *Haseldine v. Daw & Son Ltd.*, (1941) 2 K.B. 343, 362 C.A.; above, paras. 14 and 18. It is submitted that in view of these cases, *Earl v. Lubbock*, (1905) 1 K.B. 253, if it decided that the repairer cannot be liable, is not now good law; it may be explained on other grounds; see (1932) A.C. at pp. 591, 592, 615; *Stennatt v. Hancock*, (1939) 2 A.E.R. 578 (repairer held liable). For an earlier case where a repairer was held liable to a third party, see *City of Birmingham Tramways Co. v. Lane*, (1910) 2 K.B. 965.

4. For instances, see *Taylor v. Union Castle Mail Steamship Co.*, (1932) 48 T.L.R. 249 (port authority not liable for delivering bags of grain mixed with some castor seed without knowledge of its injurious properties); *Daniels v. White & Sons*, (1938) 4 A.E.R. 258 (manufacturers of lemonade held not liable for carbolic acid in it not due to any neglect of theirs).

of it, or if the breach of duty is not shown to have caused the damage.¹ A circumstance severing the causal relation between the breach of duty and the damage is the failure on the part of the buyer or ultimate user to inspect the chattel, when he had a reasonable opportunity to do so.² Conversely the absence of such an opportunity would be relevant to show that the causal relation subsists. In *Donoghue v. Stevenson*,³ Lord Atkin suggested, however, that these facts would affect the proximity of the relationship between the manufacturer and the ultimate user, and thereby the origin of the duty of the former towards the latter. The relationship would be proximate if there was absence of a reasonable opportunity for inspection and too remote if inspection by the intermediate buyer or user might reasonably have been interposed. As the theory of proximity or proximate relationship as a foundation of the duty to take care has been criticised by high authority,⁴ the former mode of regarding these facts as affecting the causal relation would appear to be the approved one.⁵ The phrase 'reasonable opportunity' would require not merely that an intermediate or ultimate buyer or user had an opportunity but in the circumstances he should reasonably be expected to use it.⁶ A firm of manufacturers of chemicals sold to retailers a supply of chemicals which were incorrectly compounded but by their invoice warned them to test it before resale. The retailers had without testing it sold it to the head-mistress of a school who gave it to the plaintiff, a schoolgirl, to use in an experiment. An explosion followed and the plaintiff was injured. It was held that the manufacturers were not liable but the retailers were.⁷ It would have been no defence to the latter that the head-mistress had an opportunity to make a test, as she had not been advised to make it before use. But where the defendants had manufactured and supplied a bull-ring to the Bournemouth Corporation for use in an over-head system of trolley wire and the bull-ring broke with the result that an employee of the Corporation was killed by a fall, it was held that the defendants were not liable as the Corporation had the opportunity and the means of testing it.⁸

1. *Evans v. Triplex Safety Glass Co.*, (1936) 1 A.E.R. 283.

2. *Dransfield v. British Insulated Cables, Ltd.*, (1937) 54 T.L.R. 11.

3. (1932) A.C. at p. 582.

4. Above, para. 10; below, page 432, note 3.

5. *Grant v. Australian Knitting Mills, Ltd.*, (1936) A.C. at p. 105.

6. *Herschthal v. Stewart and Arden Ltd.*, (1940) 1 K.B. 155 (if there was the opportunity but the defendants did not anticipate its use, they would be liable).

7. *Kubach v. Hollands*, (1937) 3 A.E.R. 907.

8. *Dransfield v. British Insulated Cables, Ltd.*, (1937) 4 A.E.R. 382, *per* Hawke, J. The learned Judge's reference to a mere 'opportunity of inspection' is open to the criticism in 54 L.Q.R. 59, but his conclusion on the facts (p. 388) would perhaps satisfy the test above suggested. See also *Paine v. Colne Valley Electricity Supply Co.*, (1939) 160 L.T. 124.

60. **The importance of *Donoghue v. Stevenson*.**—Its importance consists in its releasing the law of negligence from the cramping influence of an irrelevant and irrational formula rather than in the enunciation of any new doctrine.¹ The formula to which reference has often been made was irrelevant because it was an importation of the doctrine of privity from the law of contract into the law of tort. It was irrational because a person who commits a breach of a contract with another may be also failing in his duty to use care to others. This is recognised where a carrier is held liable for injury to a passenger though his contract to carry the latter is with another. An owner of premises who fails to perform his contract with his tenant to repair may become liable for a nuisance arising thereby to an adjoining occupier. Therefore a duty in contract to *A* may concur with a duty independent of contract to *B*. Similarly even as between parties to a contract, a duty undertaken by the contract and one independent of it may concur, as in the case of carrier and passenger, invitor and invitee for payment, doctor and patient. "The undertaking is but the occasion and inducement of the wrong."² It is therefore strange that this formula should have been invoked to deny relief in a number of contexts in the law of negligence.³ The explanation appears to be that though in form legal, the formula did not embody any juristic principle but only represented a phase of judicial policy. It was undoubtedly the opinion of courts in England at one time that it was necessary in the interests of trade and commerce to protect men engaged in them from actions at the instance of persons other than those with whom they entered into contractual relations for injuries resulting from their improper performance of their contracts.⁴ Though this view was becoming untenable in the changed conditions of modern life and industry, the formula persisted as a sort of legal dogma for a long time.⁵ Its final and authoritative refutation is contained in the following passage in the judgment of Lord Macmillan in *Donoghue v. Stevenson*⁶ :

"The fact that there is a contractual relationship between the parties which may give rise to an action for breach of contract, does not exclude the co-existence of a right

1. *Haseldine v. Daw & Sons Ltd.*, (1941) 2 K.B. 343 at p. 359, *per* Scott, L. J. "The three majority opinions in it establish our law of negligence on the firm foundation of general principle." 2. Pollock, Torts, p. 427.

3. See also above, paras. 32 and 36; above. Chap. VI, para. 52; Chap. IX, paras. 9 and 10. Another notable instance is the doctrine of common employment; below, Chap. XVI, para. 19. The formula belonged to the same family of ideas as 'sanctity of contract', 'freedom of contract,' and '*laissez faire*' which were the ruling doctrines in the economics and social philosophy of the last century. As to these doctrines, see Chap. XI, paras. 14, 17 and 18.

4. See, for instance, *Earl v. Lubbock*, (1905) 1 K.B. at p. 259, *per* Mathew, J.

5. Adherence to the cases applying the formula was expressed by the C.A. in *Bottomley v. Bannister*, (1932) 1 K.B. 458, above, para. 32, decided only a few months before *Donoghue v. Stevenson*. A final and powerful plea for it was put up by Lord Buckmaster in *Donoghue's* case itself.

6. (1932) A.C. at p. 610.

of action founded on negligence as between the same parties, independently of the contract, though arising out of the relationship in fact brought about by the contract. Of this the best illustration is the right of the injured railway passenger to sue the railway company either for breach of the contract of safe carriage or for negligence in carrying him. And there is no reason why the same set of facts should not give one person a right of action in contract and another person a right of action in tort."

The decision is therefore of great value and has since influenced the course of decisions in this and other parts of the law of negligence.¹ In *Barnes v. Irwell Valley Water Board*² Slesser, L.J. observed that the defendants' liability would not have been accepted at an earlier time but followed now from the more recent methods of eliminating plumb-solvency and also from the later developments in the conception of negligence as explained in *Donoghue's* case. It is important to remember that the decision was arrived at by applying the old principle of the reasonable man's care to particular facts and not by inventing any new doctrine. This proves the flexibility of the basic concept and its adaptability to new kinds of cases. It would therefore appear to be unnecessary to crystallise it into any such formula as that suggested by Lord Esher in *Heaven v. Pender* with the addition of 'proximity' as explained by Lord Atkin in *Donoghue's* case.³

61. Assumption of special relationships.—The assumption of special relationships gives rise to appropriate duties under the law, e.g., duty of a bailee to use reasonable care of the goods bailed, of a carrier of passengers to take care of their safety, of a skilled workman or artificer to have the skill necessary for the work undertaken and to exercise it. These duties are independent of contract and were formerly enforced through a delictual form of action like trespass on the case.⁴ But owing to the use of the action of assumpsit for the same purpose they came to be spoken of as implied contracts and warranties.⁵ The result has been to transfer to the law of contracts a large body of rules relating to the duties imposed by law on persons assuming various relationships,

1. For instance, see *Cunard v. Antifyre, Ltd.*, (1933) 1 K.B. 551; *Wilchick v. Marks*, (1934) 2 K.B. 56; *Haynes v. Harwood*, (1935) 1 K.B. 146; *Brown v. Cotterill*, (1934) 51 T.L.R. 21; *Sharp v. Avery*, (1938) 4 A.E.R. 35 (C.A.); *Old Gate Estates v. Toplis*, (1939) 3 A.E.R. 209.

2. (1939) 1 K.B. 21 at p. 42; above, para. 47. In *Milnes v. Huddersfield Corporation*, (1886) 11 A.C. 511, a similar case the defendants were held not liable on the ground that there was no breach of statutory duty. Breach of a common law duty could not apparently be thought of then by the H.L.

3. Above, paras. 9 to 11. "Talk about proximity, a kind of fictitious poor relation of 'privity', a notion which belongs to the law of contract and is wholly out of place here . . . is to be deprecated;" Pollock, 49 L.Q.R. p. 23. For cases of the 'proximity' test being applied, see note 1, above.

4. Holdsworth, Vol. III, pp. 385, 386; above, Chap. I, para. 12.

5. Above, Chap. I, para. 17.

e.g., bailees, carriers, workmen, artificers, doctors, solicitors,¹ agents for special or skilled services like bankers, auditors, surveyors and brokers. These rules are therefore not discussed in this treatise. The duties arising from the assumption of certain relations like guardian, trustee, or executor fell outside the sphere of the law of torts for another reason, *viz.*, that they were enforced by courts of equity.² In spite of these circumstances actions against persons assuming special relationships may often lie in tort.³

61-(a). Historical importance of cases of special relationships.—

The action of trespass on the case against common carriers, bailees and skilled workmen for damage due to their neglect has played a great part in the evolution of the law of torts as well as the law of contracts.⁴ In the first place, certain cases⁵ of the fourteenth century like that against a ferrymen who by overloading his boat caused horses entrusted to him to be drowned, and a farrier who negligently shod a horse and injured it, were among the earliest instances of the action on the case which in later times became the great instrument for the expansion of the law of torts. Secondly, the famous case of *Coggs v. Bernard*,⁶ was an action against a bailee and was the occasion for a great disquisition on the law of negligence by Chief Justice Holt. The defendant had undertaken to carry some casks of brandy belonging to the plaintiff from one cellar to another and on account of the fault of his servants one of the casks was damaged and its contents were spilt. It was held that he was liable though it was not alleged in the plaint that he was a bailee for reward. This case is a landmark in the history of the law of negligence because it overruled the earlier view that a bailee was absolutely liable to the bailor for the loss of goods bailed and held that he was liable only for negligence. The old rule was retained in the case of common carriers and innkeepers. But in applying the doctrine of negligence, Holt, C.J., imported the distinctions of the Roman law between degrees of care. They did not however become part of the English law, and were superseded by the uniform standard of the reasonable man's care.⁷ This standard now applies to a gratuitous bailee as well as a bailee for reward.⁸ Lastly, in the old precedents of actions on the case against the carrier, bailee or artificer, it was usual in the declaration to allege an *assumpsit* or undertaking on his part. He could not be sued in

1. For an instance of an action against solicitor for negligence in advising client, see *Richards v. Cox*, (1942) 2 A.E.R. 624 C.A. 2. Above, Chap. I, para. 9.

3. *Camkin v. Bishop*, (1941) 2 A.E.R. 713 C.A. (action for negligence against school-master). 4. Holdsworth, Vol. III, pp. 375, 385, 430; Vol. VIII, p. 450.

5. Above, Chap. I, para. 12.

6. (1703) 2 Ld. Raym. 909; 1 Sm. L.C. 175.

7. Above, para. 3.

8. Indian Contract Act, ss. 151, 152; see also *Bullen v. Swan Electric Engraving Co.*, (1907) 23 T.L.R. 258; *Phipps v. New Claridge's Hotel*, (1905) 22 T.L.R. 49; *Giblin v. McMullen*, (1898) L.R. 2 P.C. 317.

trespass as there was no direct or forcible injury. He was therefore sued in an action on the case by alleging an assumpsit or undertaking as a circumstance which rendered his conduct wrongful or an actionable breach of duty. This feature of these actions on the case was utilised by lawyers and judges to extend the remedy to cases where the wrongful act was not a misfeasance or negligent performance of an undertaking but a non-feasance or failure to perform it. In that way a remedy for enforcing contracts which was then wanting was supplied by means of a delictual form of action. In its specialised form it came to be known as the action of assumpsit and served as the medium for the development of the law of contracts.¹

62. Causal relation between negligence and damage.—It is not enough for the plaintiff to prove that the defendant's conduct has been negligent; he should also establish that it was the direct cause of the harm complained of. The phrase 'direct' cause or consequence is now the approved method of expressing the causal relation, while in older cases it was usual to speak of 'proximate, natural, probable, necessary, or immediate consequences.'² These phrases are used in law to indicate, though imperfectly, the distinction between a causative agency which deserves to be punished or made liable to pay damages and one which does not. The problem of causation is not one of mechanical or logical sequence but is a practical problem of deciding whether in justice the defendant should be made to pay for the damage which he did not intend but had a greater or less part in producing.³ It is solved by courts in accordance with the ideas of justice, the experience and even the prejudices prevalent at the time. The question is one of fact depending on all the circumstances and there is no single test or formula which will serve in all cases. The problem of causation in cases where there is no negligence or other wrongful act of the party sought to be held liable to pay for the damage would be different as will be noticed later.⁴

63. Test of proximity.—For instance, the test of proximate-ness or proximity is of long standing and has the support of a maxim of Bacon :

"In jure non remota causa, sed proxima spectatur;" "It were infinite for the law to judge the cause of causes, and their impulsions one of another; therefore it contenteth itself with the immediate cause and judgeth of acts by that without looking to any further degree."⁵

1. Holdsworth, Vol. III, p. 417; Holmes, Common Law, p. 247.

2. For a discussion of these terms, see the judgment of Lord Sumner in *Weld-Blundell v. Stephens*, (1920) A.C. at p. 984; cf. Indian Contract Act, ss. 73, 212.

3. "In the varied web of affairs, the law must abstract some consequences as relevant, not perhaps on grounds of pure logic but simply for practical reasons", *per* Lord Wright in *The Edison*, (1933) A.C. at p. 460. See Jeremiah Smith, *Selected Essays on Torts*, p. 650; Wigmore, *Cases on Torts*, Vol. I, pp. 871, 872. 4. Below, para. 93(a).

5. (1596) Works, Spedding's Ed. XIV, 189; Wigmore, *Cases on Torts*, Vol. I, p. 870.

It is no doubt true that generally speaking the conscious act of volition nearest in point of time to the injury is in law the responsible cause.¹ But it is not always the sole deciding factor. A person who drives his car negligently and causes a street accident may be liable to pay for the loss of limb of the injured man though the proximate act which caused the loss was the surgeon's amputation. He may have to pay even if the surgeon made an honest mistake; but it would be otherwise if the surgeon was guilty of negligence or bad faith. The test of proximity is of no avail where there is a duty to anticipate and guard against the intervention of other causes, e.g., a bailee's negligence resulting in loss due to the goods being stolen by a thief.

64. Test of probability or foreseeability.—Another well-known test is that of probability or foreseeability. It was formulated by Pollock, C.B. in *Greenland v. Chaplin*²:

"A person is expected to anticipate and guard against all reasonable consequences but he is not by the law of England expected to anticipate and guard against that which no reasonable man would expect to occur."

On the other hand a different view was suggested by Channel and Blackburn, JJ., in *Smith v. L. & S. W. Ry. Co.*³:

"The question what a reasonable man might foresee is of importance only in considering the question whether there is evidence for the jury of negligence or not, but when it has been once determined that there is evidence of negligence, the person guilty of it is equally liable for its consequences, whether he could have foreseen them or not."

In that case the servants of the defendants, a railway company, had heaped trimmings of hedges and grass near the railway line and kept them there in dry weather. A fire started in these trimmings presumably from a spark from one of the engines passing on the railway line and spread to a stubble field beyond the hedge and was thence carried by a high wind to the plaintiff's cottage which was burnt. It was held that the defendants were liable for the results which naturally followed from their negligence in leaving the heaps of trimmings in dry weather near the railway line where engines that pass might drop sparks, though they could not have been reasonably anticipated. This view was accepted by the Court

1. The test is decisive in the law of marine insurance; Marine Insurance Act, 1906 (6 Ed. 7, c. 41), s. 55; see also *Dudgeon v. Pembroke*, (1874) L.R. 9 Q.B. 581; 2 A.C. 284; but not if there is a warranty of sea-worthiness; cf. *Leyland Shipping Co. v. Norwich Union*, (1918) A.C. 350; *Fairclough v. Swan Brewery Co.*, (1912) A.C. 565; *Clan Line Steamers v. Board of Trade*, (1929) A.C. 514.

2. (1850) 5 Ex. 243, 248; *Rigby v. Hewitt*, (1850) 5 Ex. 240, 243. It was applied in *Sharp v. Powell*, (1872) L.R. 7 C.P. 253, as to which see *Wild-Blindell v. Stephens*, (1920) A.C. at p. 984; and Restatement II, § 238; see also *In re London Tilbury and Southend Ry.*, (1889) 24 Q.B.D. 326, 329.

3. (1870) L.R. 6 C.P. 14, at p. 21; *Indian General Navigation and Ry. Co. v. Eastern Assam Co.*, (1920) I.L.R. 47 Cal. 1027, per Mookerjee, J.

of Appeal in the case of *In re Polemis and Furness, Withy & Co.*¹ The defendants were charterers of the plaintiff's ship and negligently allowed a plank which was used as a platform for raising cases of benzine from the lower hold to the 'tween deck to fall down into the hold where there was already considerable petrol vapour owing to the leakage of petrol tins stored there. The fall of the plank was immediately followed by a rush of flames resulting in the total destruction of the ship. The defendants were held liable for the actual loss which resulted, though they could not have reasonably anticipated it. Scrutton, L.J., stated the rule thus:² "Once the act is negligent, the fact that its exact operation was not foreseen or that the damage it in fact causes is not the exact kind of damage one would expect is immaterial, so long as the damage is in fact directly traceable to the negligent act, and not due to the operation of independent causes having no connection with the negligent act, except that they could not avoid its results." In a later case³ the learned Judge gave the following illustration: "You negligently run down a shabby looking man in the street and he turns out to be a millionaire engaged in a very profitable business which the accident disables him from carrying on; or you negligently injure the favourite for the Derby whereby he cannot run—you have to pay damages resulting from the circumstances of which you have no notice." The difference in the tests for deciding the questions of negligence and causation may be stated thus. A person is negligent if he as a reasonable man should have foreseen that his conduct involves undue risk of injury to the plaintiff or a class of persons of whom the plaintiff is one. His negligence is the direct cause of the injury if a judge or jury would so regard it by looking back from the actual injury to the negligent act and with a knowledge of all the forces that operated to produce the result.⁴ It must, however, be mentioned that the test of foreseeability though irrelevant in cases of direct physical consequences like *In re Polemis* would be relevant, as we will see presently, in other cases where

1. (1921) 3 K. B. 560; the same view had been already indicated by Lord Sumner in *Weld-Blundell v. Stephens*, (1920) A.C. at p. 984. For later cases, see *Hambrook v. Stokes*, (1925) 1 K.B. 141, 150, 156; *G.W. Ry. Co. v. S. S. Mostyn*, (1928) A.C. at p. 91. For a criticism of this case, see Pollock, *Torts*, pp. 29, 30; 38 L.Q.R. 165; 44 L.Q.R. 142; 40 Har. L.R. 164; Winfield, *Tort*, p. 75; A. L. Goodhart, *Essays in Jurisprudence and Common Law*, p. 110; Beven supported the view in *Smith v. L. & S. W. Ry. Co.*, Vol. I, p. 89. See also Jenks, *New Jurisprudence*, pp. 201-206; A.D. Mac Nair, "This Polemis business", 4 Camb. L.J. 125; Justice Sir S. L. Porter, *The measure of damages in Contract and Tort*, 5 Camb. L.J. 176. See also *Hay v. Young*, (1943) A.C. 92, 99, 100, 110.

2. (1921) 3 K.B. at p. 577.

3. *The Arpad*, (1934) P. at p. 202.

4. *British Columbia Electric Ry. Co. v. Loach*, (1916) 1 A.C. at p. 727. "The question is one of remoteness of cause and not remoteness of damage"; Jenks, *Book of English Law*, p. 424. For an useful analysis of the relevant considerations in deciding causation, see *Restatement*, II, § 433.

independent agencies also operate to produce the result.¹ The truth is that the problem of causation has to be tackled differently in different types of cases and no single test or formula will suit all.

65. Three categories of causation.—There are broadly speaking three types of cases: (a) The damage complained of follows from the defendant's conduct in natural sequence and without the operation of another human agency. Here the problem is to choose between two alternatives, *viz.*, to deny compensation altogether to the injured or to make the defendant pay for results which he did not contemplate. (b) The damage follows also from the operation of another human agency. This agency may be a third person. In such a case the problem is not one of denial of a remedy to the plaintiff, but a choice of the person who must pay. (c) The other agency may be the plaintiff himself. Here considerations arise which are different from those in the case of a third person's intervention.

66. Damage resulting in natural sequence.—Where the defendant's conduct is connected with the damage complained of by a sequence of ordinary, natural events or forces, it is the direct cause of the damage in law.² It would be otherwise where the event is an extraordinary natural occurrence or an act of God. In *Blyth v. Birmingham Water Works Co.*,³ the defendants were held not liable for the consequences of an unusually severe frost. But if a person was bound to anticipate and guard against even extraordinary events, he would be liable for the consequences.⁴ Where the defendant's conduct is connected with the damage by a series of natural forces, the defendant is responsible for the damage though he did not and could not anticipate it; *e.g.*, *Smith v. L. & S. W. Ry. Co.*,⁵ *In re Polemis*,⁶ cases of nervous shock as in *Hambrook v. Stokes*,⁷ physical injury caused by the defendant's negligence resulting in death owing to supervening complications like septic pneumonia which may not have supervened

1. *The Edison*, (1933) A.C. at p. 460, *per* Lord Wright. See also *Domine v. Grimsdall*, (1937) 106 L.J.K.B. 386, 390, *per* Atkinson, J.

2. *Per* Lord Herschell in *The Argentino*, (1889) 14 A.C. 519, 523. Cf. cases of insurance; *e.g.*, *Smith v. Cornhill Insurance Co.*, (1938) 3 A.E.R. 145 (accident insurance); *Canada Rice Mills Ltd. v. Union M. & G. Insurance Co.*, (1941) A.C. 55; *Yorkshire Dale S. S. Co. v. Minister of War Transport*, (1942) A.C. 691 (marine insurance).

3. (1856) 11 Ex. 781; above, para. 3.

4. *Greenock Corporation v. Caledonian Railway Co.*, (1917) A.C. 556; above, Chap. VI, para. 80; *Hills & Sons v. British Airways*, (1936) 55 Ll.L. Rep. 20 (bailee of aeroplane liable for allowing it to be blown off by a strong gust of wind).

5. (1870) L.R. 6 C.P. 14; above, para. 64. Cf. *Chotey Lal v. Dalip Narain*, 1938 Pat. 562.

6. (1921) 3 K.B. 560; above, para. 64.

7. (1925) 1 K.B. 141; above Chap. II, para. 6.

the intervention forms a new and independent cause,¹ or to use a current phrase, a *novus actus interveniens*,² i.e., a cause which severs the causal connection between the defendant's negligence and the damage. In solving it, the following principles are deducible from the case-law and may be helpful.

71. Involuntary intervention.—If the intervention of a third person was not a conscious act of volition but done in a state of excusable alarm or in self-protection or self-defence owing to the danger created by the defendant's negligence,³ then it is not a new and independent cause and the defendant's negligence is the direct cause; e.g., in *Scott v. Shepherd*,⁴ the acts of the intermediate agencies who flung across the squib were not, but the defendant's act in throwing it was, the direct cause. In *Vandenburgh v. Truax*,⁵ a New York case, the plaintiff's servant and the defendant quarrelled in the street and the defendant took hold of the former who broke loose from him and ran away. The defendant took up a pickaxe and pursued the servant who fled into the plaintiff's store and in running behind the counter knocked out the faucet from a cask of wine, whereby the wine ran out and was lost. The defendant was held liable for the damage.

72. Voluntary or wilful intervention.—Where the intervention was a conscious act of volition, the defendant would still be liable if he should have as a reasonable person anticipated and avoided it.⁶ In other words his conduct amounts to a breach of duty to use care to avoid such intervention or to create an occasion for it. Whether the duty arises in any case depends on its facts. The case of possession or control of dangerous things or property is a clear instance. The duty may be to avoid meddling by children, e.g., *Dixon v. Bell*⁷ and *Lynch v. Nurdin*.⁸ On the

1. Bohlen, *Studies*, p. 29; 50 Har. L.R. 1229; Jeremiah Smith, *Selected Essays on Torts*, pp. 711, 712, 713. Phrases like dominant, efficient, effective, substantial, real, are used in the cases but are only question-begging epithets.

2. "What is unhappily so called," Langton, J., in *The Genus*, (1936) 2 A.E.R. at p. 801.

3. E.g., *Collins v. Middle Level Commissioners*, (1869) L.R. 4 C.P. 279; as to this case, see Lord Sumner in *The Paludina*, (1927) A.C. 16, 29; see also *Halestrap v. Gregory*, (1895) 1 Q.B. 561; *Howard v. Bergin*, (1925) 2 Ir. R. 110.

4. Above, Chap. I, para. 12. See however the observation of Scott, L.J. in *Smith v. Davey Paxman*, (1943) 1 A.E.R. 286 at p. 288 to the effect that these agencies were *novus actus interveniens*. This does not appear to be a correct statement of the law applicable to cases of trespass or negligence or consistent with the decision in *Scott v. Shepherd* that the plaintiff could hold the defendant liable in trespass. See, below, para. 93(a).

5. (1847) 4 Denio 484; cited by Pollock, *Torts*, p. 30.

6. *Haynes v. Harwood*, (1935) 1 K.B. at p. 153, *per* Greer, L.J.

7. (1816) 1 Stark. 287; above, para. 46.

8. (1841) 1 Q.B. 29; above, Chap. VI, para. 11; see also *Abbott v. Meeffe*, (1863) 2 H. & C. 744; *Engelhart v. Farrant*, (1897) 1 Q.B. 240; *Shiffman v. St. John of Jerusalem*, (1936) 1 A.E.R. 557; *Wells v. Metropolitan Water Board*, (1937) 54 T.L.R. 104.

other hand where boys trespassed into a railway line and set in motion a van which ran down an incline and knocked down a person in a level crossing, the railway company was held not liable.¹ A duty to avoid the wilful intervention of adults may also arise, though it is more difficult to make out. In *Illidge v. Goodwin*,² the defendant was held liable when a stranger whipped the horse of the defendant's carriage left unattended in the street and made it bolt and injure the plaintiff. The decision may be supported if the carriage had been left for an unreasonably long time or in a crowded street but not if the driver had just left it to deliver a parcel.³ Sometimes there may be a duty to avoid even a tort or crime of others. In *R. v. Moore*,⁴ the defendant advertised his land for pigeon-shooting and was held liable for a public nuisance by reason of the damage caused to adjoining property by a crowd invading it. A person who advertised that a balloon would ascend and descend on his land was held liable when the descent actually took place in the adjoining orchard of the plaintiff into which a crowd got in, breaking down the fences and trampling the turnips.⁵ In these cases the defendant ought to have anticipated such consequences. But where he could not have done so, he would not be liable. A railway company was held not liable when an engine got derailed and accidentally fell into the plaintiff's garden where a crowd rushed to see it out of idle curiosity and did damage.⁶ A doctor who negligently certified a person as a lunatic under the Lunacy Act was held liable for the detention of the alleged lunatic by other persons on the strength of the certificate⁷; he should have expected or intended them to act in the way they did. Sometimes the duty to use care to prevent wilful wrongs of third parties may be assumed or undertaken by a person; thus a bailee or carrier of goods is liable if his negligence results in a theft. A banker or other financial adviser is liable if he negligently recommends to the client an insolvent borrower who swindles the client.⁸ In *London Joint Stock Bank v. Macmillan*,⁹ a customer of a bank was held liable to be debited by

1. *McDowall v. G. W. Ry. Co.*, (1903) 2 K.B. 331; cf. *Martin v. Stanborough*, (1924) 41 T.L.R. 1; see also *Parker v. Miller*, (1926) 42 T.L.R. 408.

2. (1831) 5 C. & P. 190; cf. *Ruo'ff v. Long*, (1916) 1 K.B. 148, 152; see also *Clark v. Chambers*, (1878) 3 Q.B.D. 327.

3. Per Lord Sumner in *Weld-Blundell v. Stephens*, (1920) A.C. at p. 989 and Lord Shaw in *Glasgow Corporation v. Taylor*, (1922) 1 A.C. 44, 62.

4. (1832) 3 B. & Ad. 194: above Chap. VI, p. 201, note 6; see also *Bellamy v. Wells*, (1890) 60 L.J. Ch. 156.

5. *Scott's Trustees v. Moss*, (1889) 17 R. 32 (Ct. of Sess.); *Guille v. Swan*, (1822) 19 Johns. 381; cited in Pollock, Torts, (13th Ed.), p. 40.

6. *Scholes v. N.L. Ry. Co.*, (1870) 21 L.T. 835.

7. *Harnett v. Fisher*, (1927) 1 K.B. 402; *De Freville v. Dill*, (1927) 96 L.J.K.B. 1056; see also *Everett v. Griffiths*, (1921) 1 A.C. 631.

8. *De La Bere v. Pearson*, (1907) 1 K.B. 483.

9. (1918) A.C. 777; cf. *Baxendale v. Bennett*, (1878) 3 Q.B.D. 525; see also *Greenwood v. Martins Bank*, (1932) 1 K.B. 371.

the bank with the loss caused by his drawing a cheque in favour of his clerk in such a careless way that the clerk filled up figures and altered the cheque for £2 into one for £120. In the above instances a duty arose even in respect of a wilful act of a third party. The duty may be to avoid the negligence or the lawful or excusable act of a third party. On similar facts a duty is more easily made out when the intervention is an excusable act than where it is negligent or wilful.¹ The fact that the intervention is excusable or lawful is not by itself enough to raise a duty; but it is more within the range of probability than the wilful or negligent wrongs of others.² Similarly it is more likely that others may be careless or mistaken than that they would commit crimes or other wilful wrongs. A driver of a car negligently knocking down a person in a road with heavy motor traffic may be responsible for another car running over the injured if the second injury was an inevitable accident but not if it was avoidable or negligent. In some circumstances, however, there may be a duty on the part of the driver to anticipate even the negligence of others on the road.³ A gas company was held liable when it kept molten lead in land near a highway for repairing a gas-main, and a passer-by accidentally knocked down the ladle containing the lead which spilt and injured the plaintiff, a child playing nearby.⁴ In another case⁵ the defendants, contractors for supply of gas, used a defective and leaky pipe to take the gas from the defendants' main to the plaintiff's shop, and the gas escaped through the pipe into the shop. When a gas-fitter's servant went there with a lighted candle to see what was wrong, there was an explosion resulting in injury to the plaintiff's property. It was held that the defendants were liable.

73. The doctrine in *Weld-Blundell v. Stephens*.—Before passing, it is necessary to note that the decision in *Weld-Blundell v. Stephens*,⁶ appears to dispute the principle deducible from the authorities mentioned above. Lords Sumner and Wrenbury expounded the view that the

1. This is not opposed to the remark of Lord Sumner in *The Fulstina*, (1927) A.C. at p. 28, "cause and consequence in such a matter do not depend on the question whether the first action, which intervenes, is excusable or not, but on the question whether it is new and independent or not." This is not stated as a general rule but confined to the facts of that case.

2. *Per* Lord Haldane in *Canadian Pacific Ry. Co. v. Kelvin Shipping Co.*, (1927) 138 L.T. 369 (mistaken judgment of a vessel in collision due to defendant's negligence not a *novus actus interveniens*).

3. *Lynam v. Dublin United Tramways Co.*, (1919) 2 Ir. R. 445; for instances of such joint negligence, see *McKenna v. Stephens and Hull*, (1923) 2 Ir. R. 112; *Collins v. Middle Level Commissioners*, (1868) L.R. 4 C.P. 279; see also *Howard v. Bergin*, (1925) 2 Ir. R. 110.

4. *Crane v. South Suburban Gas Co.*, (1916) 1 K.B. 33; above, Chap. VI, para. 12.

5. *Burrows v. March Gas Co.*, (1872) L.R. 7 Ex. 96; 5 Ex. 67; for a similar case see *Brooke v. Bool*, (1928) 2 K.B. 578.

6. (1920) A.C. 957; above, Chap. VII, para. 89.

probability of a consequence arising from the defendant's breach of duty to the plaintiff would not make it the legal cause. Lord Sumner observed¹: "That a jury can finally make *A* liable for *B*'s act, merely because they think it antecedently probable that *B* would act as he did apart from *A*'s authority or intention, seems to me to be contrary to principle and unsupported by authority." It is no doubt true that mere probability is not enough but it is necessary that *A*'s conduct should amount to a breach of duty to take care to avoid results similar to *B*'s act. It is however, difficult to see why the defendant's conduct in that case was not of that kind.² The theory that the defendant's conduct only created the occasion for the manager to behave as he did and was at most the *causa sine qua non* while the manager's act was the *causa causans* does not seem to get over the difficulty. This decision of the House of Lords did not prevent Greer, L.J., saying in *Haynes v. Harwood*,³ that "if what is relied upon as *novus actus interveniens* is the very kind of thing which is likely to happen if the want of care which is alleged takes place, the principle embodied in the maxim has no application." It must also be mentioned that the decision in *Ward v. Weeks*,⁴ on which the Law Lords relied, was the result of the peculiar judicial policy in the law of slander of which *Vicars v. Wilcocks*,⁵ since disapproved, was another instance. Even in the law of slander the rule in *Ward v. Weeks* does not prevail in the broad form in which it was stated.⁶ We will see presently that the decision in *Weld-Blundell's* case proceeded also on the ground that the plaintiff's wrongful act in publishing a malicious libel was in law the cause of his own loss and he could not recover.⁷ The question of causation in a case of plaintiff's contributory conduct is governed by considerations of legal policy which have no place in deciding whether the act of the defendant or a third party is the responsible cause.⁸

74. Novus actus interveniens.—This is a phrase which is used to refer to an intervening agency which in the circumstances becomes a new and independent cause and breaks the causal relation between the defendant's antecedent wrongdoing or negligence and the resulting damage.⁹ This new agency may be (a) the operation of natural forces, (b) the conduct of the plaintiff himself,¹⁰ or, (c) the conduct of a third person. As regards the first, it would not be a new or independent cause if it flows from the defendant's wrongful conduct in the ordinary course of things.

1. (1920) A.C. at p. 988.

2. See the criticism by Scrutton, L.J., cited above, Chap. VII, para. 89.

3. (1935) 1 K.B. at pp. 153, 156.

4. Above, Chap. VII, para. 89.

5. Above, Chap. VII, para. 88.

6. Above, Chap. VII, para. 89.

7. Below, para. 76.

8. Below, para. 77.

9. As to these phrases, see *The Oropesa*, (1943) P. 32, 39; *Summers v. Salford Corporation*, (1943) A.C. 283, 296.

10. *Summers v. Salford Corporation*, *ibid.*

This has been already discussed. The same rule would apply to the second also with the additional condition that the plaintiff's conduct is not blameworthy. This will be discussed presently under contributory negligence. As regards the third, the rule may be stated thus: Intervention by a conscious act of volition of a third person is, in the absence of a duty of the defendant to take care to avoid it, a new and independent cause and the defendant's antecedent negligence would not in law be the direct cause of the resulting damage. When the intervention is wilful and there is no duty of the defendant to guard against it, he is clearly not liable. A person is not ordinarily liable for repetition of his slanderous words by other persons. It is otherwise if he was bound to anticipate and guard against it.¹ An action was not allowed where the plaintiff sued a railway company on the ground that on account of the negligence of its servants in allowing overcrowding in a railway carriage in which he was seated, he was robbed by a gang of thieves.² In *Harnett v. Bond*,³ the plaintiff could not recover damages for imprisonment which though indirectly caused by the defendant was really the act of a third party in the exercise of his independent judgment. The intervention though wilful, may be a lawful act within the right of the third person. A person negligently causing injury to another in a motor accident cannot be held liable to pay for the latter's loss of a job or legacy owing to his being unable to reach his employer or benefactor in time; the act or omission of the employer or benefactor is the real cause.⁴ Similarly, a third person's intervention may be negligent and would be an independent cause if there was no breach of duty to anticipate and guard against it.⁵ If *A* knocks down *B* by rash driving, *A* cannot be expected to anticipate the independent negligence of the surgeon in operating on *B*, or of the driver of another car colliding with the vehicle in which *B* is taken to the hospital.⁶ A tramway company was held not liable when the plaintiff who attempted to get into a tram at an optional stopping place and put her foot on the tram, was thrown down by the tram suddenly starting owing to the bell being rung by a passenger.⁷ In *The Paludina*,⁸ three ships *A*, *B* and *C* were moored in a harbour. During a swell and rough

1. Above, Chap. VII, para. 89.

2. *Cobb v. G.W. Ry. Co.*, (1893) 1 Q.B. 459; (1894) A.C. 419.

3. (1925) A.C. 669; (1924) 2 K.B. 517; above, Chap. II, para 17; see also *Achurath Parakkat v. Mekhileri*, (1924) 86 I.C. 588 (Mad.)

4. *Hoey v. Felton*, (1861) 11 C.B.N.S. 142, 143; "A midshipman detained on shore cannot complain that if he was afloat he would have been a lieutenant."

5. *Per Phillimore, J.*, in *Hartley v. Rochdale Corporation*, (1908) 2 K.B. 594, 600.

6. *The San Onofre*, (1922) P. 243, 249.

7. *Wagner v. West Ham Corporation*, (1920) 37 T.L.R. 86; on the other hand if there was proved negligence of the conductor in not keeping control of the bell, the Tramway Company would be liable; *Steele v. Belfast Corporation*, (1920) 2 Ir. R. 125.

8. (1927) A.C. 16.

weather, *A* negligently came into collision with *B* with the result that *B* fell on *C* and cast her adrift. Twenty minutes later when *B* and *C* were manœuvring to get away from the shore, *C* got under the starboard quarter of *B*, and was struck by *B*'s revolving propeller. The propeller was damaged and *C* sank. It was held that the damage to *B* and the loss of *C* were not the direct consequences of *A*'s original negligence but were due to the independent acts of *B* and *C* unconnected with the collision. On the other hand, *The Oropesa*¹ is an illustration of a different set of facts. A collision occurred at sea between the ships, the *Oropesa* and the *Manchester Regiment*, whereby the latter was so seriously damaged that her captain ordered the majority of the crew to take to the life-boats. He then decided to go with fourteen of the crew to the *Oropesa* in a life-boat to arrange for salvage assistance. This life-boat capsized as a result of which nine of the crew lost their lives. In an action by the personal representatives and dependants of one of the deceased for damages against the owners of the *Oropesa*, the latter contended that the action of the captain in ordering the men to row to the *Oropesa* interrupted the causal relation between the negligence of that vessel and the death of the seamen. The Court of Appeal held that it did not and that it was the natural consequence of, or consequence flowing in the ordinary course of things from the emergency in which the captain was placed by the negligence of the defendants' ship. The phrase "ordinary course of things" is not confined only to the operation of natural forces but includes reasonable human conduct. If the captain did something which was outside the exigencies of the emergency, whether it was from miscalculation or from error or from mere wilfulness, it would be a new cause. Lord Wright observed: "the question is not whether there was new negligence but a new cause." He proceeded to say that the test of a new cause or *novus actus interveniens* is "whether there is something which I will call ultraneous, or something unwarrantable, a new cause coming in and disturbing the sequence of events, something that can be described as either unreasonable or extraneous or extrinsic." He doubted whether the law can be stated more precisely than in that way and gave, as an extreme but obvious illustration of what he called "ultraneous conduct," the voluntary payment of bounties by the Admiralty in the case of the *S.S. Amerika*.²

75. Damage caused also by plaintiff's conduct.—The conduct may be intentional or negligent. Though the plaintiff's negligence is the usual subject of consideration under this head, the former type of conduct gives rise to some interesting problems.

76. Intentional conduct of plaintiff.—Where it is intentional in the sense that he deliberately produced loss or harm to himself he cannot

1. (1943) P. 32, C.A. See also *Smith Hogg & Co. Ltd. v. Black Sea & Insurance Co. Ltd.*, (1939) 55 T.L.R. 766 C.A.

2. Below, para. 76.

complain. This may be explained either on the principle of causation or on that of *volenti non fit injuria*.¹ But this result will not follow if his conduct though intentional, was reasonable or inevitable. A simple instance is where he spends money for medical treatment for injuries caused by another. In *A. G. v. Valle-Jones*,² two aircraftsmen of the Royal Air Force were killed in a collision of the motor cycle which they were riding with a motor lorry driven negligently by the defendant's driver. A claim by the Crown for wages paid to them and expenses incurred for their treatment in hospital during their incapacity was allowed by way of compensation for loss sustained by a master from injury to his servants. The payment was not unreasonable especially as the wages and medical expenses could have been claimed directly by the injured men from the defendant. On the other hand in the case of the *S. S. Amerika*,³ the payment of compassionate allowances by the Crown to the relatives of the deceased crew was a purely voluntary act of the Crown and not a necessary result of the defendant's negligence. Besides while in the former case there could be a claim by an employer for injury to his servants, there could be no such claim in the latter case by reason of the death of the servants. Where the plaintiff's conduct amounts to a tort or crime and he suffers the consequences, his loss would in law be regarded as due to his own wrongdoing and not to the conduct of another who enabled such consequences to arise by disclosing the tort or crime to the parties concerned. Thus in *Weld-Blundell v. Stephens*,⁴ it was held that the damages paid by the plaintiff were in law the consequence of his own conduct in publishing a malicious libel, and not of the defendant's breach of duty to keep the letter carefully. The breach of duty only created the occasion for the consequence and was not its cause. In *Howard v. Odhams Press, Ltd.*,⁵ the plaintiff, a sorter employed by the defendants in their newspaper, had been a party to frauds in connection with cross-word prize competitions promoted by them. When they found out his part in the frauds he gave them on the faith of a verbal promise of secrecy a statement implicating himself and others in several frauds against the defendants and others. They became afterwards dissatisfied with his conduct and forwarded his statement to his trade-union with the result that he was expelled from the union and was unable to obtain further employment. In an action for breach of the defendant's agreement the Court of Appeal held that the agreement was invalid as being opposed to public policy, and even otherwise the plaintiff could only get nominal

1. Below, Chap. XVIII, para. 24.

2. (1935) 2 K. B. 209.

3. (1917) A. C. 38 at p. 60; above, Chap. II, para. 33.

4. (1920) A. C. 956 at pp. 981, 998, *per* Lords Sumner and Wrenbury, above, para. 73; see also *Neville v London Express Newspaper, Ltd.*, (1919) A.C. 368, above, Chap. VIII, para. 20; *Bradstreets British Ltd. v. Mitchell*, (1933) Ch. 190; above, Chap. VII, para. 56(a). See, however, the powerful arguments of Scrutton, L. J., *contra* in *Weld-Blundell's* case, (1919) 1 K. B. 520.

5. (1938) 1 K. B. 1.

damages and not damages for the loss sustained by him as such loss would in law be the consequence of his own misconduct and not to the defendant's breach of their obligation of secrecy.¹ These cases illustrate the influence of considerations of public policy on legal causation and the divergence that may thereby arise between legal cause and cause in the popular sense.

77. Plaintiff's contributory negligence.—The principle that a person whose injury is the result of his own negligence as well as that of another may lose his right to recover compensation from the latter, was recognised long ago by the English law.² In such cases it is usual to say that he is "guilty of contributory negligence." The phrase is, however, misleading,³ because it suggests that the plaintiff whose negligence has contributed to his injury would necessarily lose his remedy. As a matter of fact, this is not invariably the case and a plaintiff can recover in spite of his negligence if the defendant had an opportunity to avoid the result of the plaintiff's negligence. Besides, the phrase suggests the idea of punishment. The considerations of policy which arise in such cases are of a different character.⁴ On the one hand it is against public interests to allow a person to recover compensation from another for the results of his own imprudence; and on the other, it is also unjust to put a careless man out of the pale of the law or allow others a free charter to do him injury. The penal theory was advanced by Lord Halsbury who said that the plaintiff guilty of contributory negligence fails because he is *in pari delicto potior est conditio defendantis*.⁵ (Where both parties are equally to blame neither can hold the other liable). The objection to this theory is, first that the plaintiff and the defendant are not, strictly speaking, *in pari delicto*. While the defendant commits a wrong or breach of legal duty, the plaintiff commits none, as he owes in law no duty to himself. Secondly, the object of the law of torts is not punishment but award of compensation. If it sought to punish the plaintiff for his negligence, he could in no case recover,—which is not the law. If it sought to punish the defendant for his negligence, the negligence of the plaintiff would then be

1. See 54 L. Q. R. 162-165.

2. Holdsworth, Vol. VIII, p. 459. It was also known to the Roman law; D. 9, 2, 9, 4 (a man interfering with a dangerous animal); D. 50, 17, 203.

3. Therefore English judges are now avoiding it in addressing juries; *per* Scrutton, L. J., in *Service v. Sundell*, (1930) 99 L. J. K. B. 55, 57 (C.A.). See also *Tuff v. Warman*, (1858) 5 C. B. N. S. 573, 584, Crompton, J. "It is a very unsafe word to use; it is much too loose"; see also Fifoot, *English Law and its Background*, p. 246.

4. For an exposition of legal policy, see Bohlen, *Studies*, pp. 526, 527; W. Schofield, *Selected Essays on Torts*, p. 550. Some states in the U. S. A. have enacted that contributory negligence does not bar recovery but would only mitigate damages, especially in actions against railway companies; Restatement II, p. 857.

5. *Wakelin v. L. & S. W. Ry. Co.*, (1886) 12 A.C. 41, 45.

no excuse at all. For instance, in the criminal law, it is no defence for a person who is guilty of causing the death of another by rash driving that the latter was also careless.¹

78. Rules as to contributory negligence.—The leading authority on the law of contributory negligence is the judgment of Lord Penzance in *Radley v. London & North Western Railway Co.*,² where he formulated the following rules :—

“The first proposition is a general one, to this effect, that the plaintiff in an action for negligence cannot succeed if it is found by the jury that he has himself been guilty of any negligence or want of ordinary care which contributed to cause the accident.

“But there is another proposition equally well established, and it is a qualification upon the first, namely, that though the plaintiff may have been guilty of negligence, and although that negligence may, in fact, have contributed to the accident, yet if the defendant could in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him.”

In other words, when two persons have been negligent, he must bear the blame who was at fault in not avoiding the result of the other's negligence.³ In the application of this test to concrete cases, it will be safe to avoid the use of those numerous phrases which are a sort of outgrowth of this subject, *e.g.*, last clear chance,⁴ proximate, substantial, dominant, efficient, real, cause.⁵ The subject may be considered under the following heads : (i) plaintiff's negligence ; (ii) cases where it bars his right of action ; (iii) cases where it does not.

79. Plaintiff's negligence.—Here the word ‘negligence’ does not mean any breach of duty to another as it does in relation to the defendant, but only careless or imprudent conduct.⁶ The test however is nearly the same in both cases, *viz.*, what a reasonable person in that situation would have done. This is a question of fact depending on the nature of the risk, the plaintiff's knowledge of it, etc. If, judged by this test, there is no careless conduct on the plaintiff's part, his intervention is immaterial. In

1. Stephen, Dig¹ of Crim. Law, 222; *R. v. Swindall*, (1846) 2 C. & K. 230; *Hlenkinsop v. Ogden*, (1898) 1 Q.B. 783; (1871) 6 M.H.C.R. Appx. p. xxxii.

2. (1876) 1 A.C. 754 at p. 759; below, para. 85. See also *per* Lord Blackburn in *Dublin Ry. Co. v. Slattery*, (1878) 3 A.C. 1155 at p. 1207; Greer, L.J., in *The Eurymedon*, (1938) P. 41 at p. 49. See *Kanshi Ram v. Owen Roberts* I.L.R. 1940 Lah. 135; 1939 Lah. 565 (contributory negligence, a question of fact.)

3. “The decision turns not simply on causation, but on responsibility”, *per* Lord Wright in *McLean v. Bell*, (1932) 147 L.T. at p. 264; also *per* Lord Sumner in *British Columbia Electric Ry. Co. v. Loach*, (1916) 1 A.C. 719 at p. 727; *per* Scott L.J., in *Smith v. Harris*, (1939) 3 A.E.R. 960 C.A.

4. It was used by Scrutton, L. J. in *Service v. Sundell*, (1930) 99 L. J. K.B. at p. 57; *Dew v. United British Steamship Co.*, (1929) 139 L.T. at p. 633.

5. *British Columbia Electric Ry. Co. v. Loach*, (1916) 1 A.C. 719 at p. 728. “Six of one and half a dozen of the other” was a phrase used in *Service v. Sundell*, above.

6. Restatement, II, § 463.

Gee v. Metropolitan Ry. Co.,¹ the plaintiff, a passenger in the defendant's train, which was passing from one station to another rose from his seat to look out, put his hand on the bar of the door and pressed against it. The door having been negligently left unfastened flung open and he was thrown out and injured. It was held that there was no evidence of any contributory negligence on the plaintiff's part as he was entitled to assume that the door was fastened. Here he had no knowledge of the door being unfastened and if he had, he would have been negligent and would have failed in his action. Sometimes a person may be entitled to act as he did, even with knowledge of some risk. In *Clayards v. Dethick*,² the plaintiff had to take his horse out of the stable into a narrow lane which led into a street. The defendant had cut a trench in that lane and heaped gravel on one side of it. The plaintiff's horse slipped from the gravel into the trench and was killed while being taken out of it. It was held that he had acted as a man of ordinary prudence and "was not bound to abstain from pursuing his livelihood because there was some danger." Similarly in *Grayson v. Ellerman Line*,³ the defendants, a firm of ship repairers, were carrying out certain works on the plaintiffs' steamer and by their negligence a red hot rivet fell through certain open hatchways on a cargo of jute and set it on fire. It was held that the defendants were liable because the plaintiffs were not guilty of any negligence in not closing the holds while the work was proceeding and were entitled to expect the defendants who were expert repairers to take the necessary precautions; and assuming that there was negligence on the plaintiffs' part, the duty to avoid the accident was finally on the defendants. Sometimes the conditions of work may negative negligence. "What is all-important is to adapt the standard of what is negligence to the facts and to give due regard to the conditions under which men work in a factory or mine, to the long hours and the fatigue, to the slackening of attention which naturally come from constant repetition of the same operation, to the noise and confusion in which the man works, to his pre-occupation in what he is actually doing at the cost perhaps of some inattention to his own safety."⁴ In the application of the test of negligence different standards would obviously apply in the case of children⁵ or old and infirm persons⁶ from those applicable to normal or adult persons.

80. Doctrine of alternative danger.—In some circumstances the plaintiff's conduct though mistaken may be held justified or excusable, as

1. (1873) L.R. 8 Q.B. 161.

2. (1848) 12 Q.B. 439.

3. (1920) A.C. 466; (1919) 2 K.B. 514. For other illustrations, see *Porters v. Jones*, (1942) 2 A.E.R. 570; above, para. 32; *Akkuri Thakur v. Dwaraka Singh*, 1939 Pat. 303.

4. *Coswell v. Powell Duffryn Associated Collieries, Ltd.*, (1940) A.C. 152, 178, 179, per Lord Wright; *Hutchinson v. L. & N. E. Ry. Co.*, (1942) 1 K.B. 481 C.A.

5. Below, para. 88.

6. *Daly v. Liverpool Corporation*, (1939) 2 A.E.R. 142 (old woman of 69 years of age crossing road, knocked down by bus, action allowed.)

where a dangerous situation was created by the defendant and for the purpose of either saving his own person or property or that of a third person, the plaintiff adopted a course of conduct which was attended with risk or in the light of later events turned out to be mistaken. It would be otherwise if it was so rash or imprudent that it was not warranted by the situation of danger. A leading instance of this principle, which has been called "the doctrine of alternative danger,"¹ is *Jones v. Boyce*.² The defendant's coach in which the plaintiff was a passenger was so badly managed that the coupling rein broke and one of the horses took fright and became ungovernable. In a state of alarm the plaintiff jumped from the coach and broke his leg. It turned out however that the carriage was soon after stopped and if he had not jumped he would not have come by any great harm. It was held that his conduct was not unreasonable in the circumstances. A person who is seriously injured by another may adopt reasonable expedients for alleviating or curing the injury; the fact that they actually aggravated it would not absolve the wrongdoer from liability.³ A passenger who on arriving at his destination got out of the train which had overshot the platform and stopped without backing was held justified in taking the risk of getting down in an unsuitable or deep ground rather than being carried on to the next station.⁴ But a person who tried to shut the door of a railway carriage which repeatedly opened in the course of the journey but did not affect him, and fell down in doing so, was held not entitled to recover.⁵ Similarly, a passenger in a train who got into a state of unnecessary alarm on seeing steam and smoke entering her compartment from the engine and being told by another passenger that the engine was on fire jumped out, was held to have acted rashly in the circumstances.⁶ The principle has been applied to maritime collisions. *The Bywell Castle*⁷ is the leading instance, and the rule itself is in that context spoken of as the '*Bywell Castle* rule.' In that case the *Bywell Castle*, when suddenly placed in a position of great peril by the action of another ship

1. Salmond, Torts, p. 474.

2. (1816) 1 Stark 493; for a case following it, see *Maclean v. Segar*, (1917) 2 K.B. 325. See *D'Urso v. Sanson*, (1939) 4 A.E.R. 26; below, XVIII, para. 26.

3. *Wilson v. United Counties Bank*, (1920) A.C. at p. 125; see also *Jones v. Wutnev*, (1912) 28 T.L.R. 399; *American Braided Wire Co. v. Thomson*, (1890) 44 Ch. D. 274 at p. 288; cf. *The Edison*, (1933) A.C. 449, above, para. 66; *Banco de Portugal v. Waterlow & Sons*, (1932) A.C. 459.

4. *Rose v. N. E. Ry. Co.*, (1876) 2 Ex. D. 248; *Robson v. N. E. Ry. Co.*, (1875) L.R. 10 Q.B. 271; 2 Q.B.D. 85; see however *per* Bramwell, B., in *Lax v. Corporation of Darlington*, (1879) 5 Ex. D. 28 at p. 35; cf. *Sharpe v. Southern Railway Co.*, (1925) 2 K.B. 311.

5. *Adams v. L. & Y. Ry. Co.*, (1869) L.R. 4 C.P. 739.

6. *Kearney v. Great Southern and Western Ry.*, (1886) 18 L.R. Ir. 303.

7. (1879) 4 P.D. 219; see also *United States Shipping Board v. Laird Lane*, (1924) A.C. 286; *Canadian Pacific Ry. Co. v. Kelvin Shipping Co.*, (1927) 138 L.T. 369; *The Larchbank*, (1943) A.C. 299.

which sailed near it, made a wrong manoeuvre and aggravated the injury. It was held that there was no contributory negligence on her part and that her captain could not be expected to be a superman, or to have perfect nerve and presence of mind and do the best thing possible.¹ In *The City of Lincoln*,² a collision took place between a steamer and a barque, the steamer alone being to blame. The steering compass, charter, etc., of the barque were lost. Her captain made for a port with the help of a compass he found on board, but owing to the loss of the requisites for navigation, the barque grounded and was abandoned. It was held that there was no negligence on his part and the defendants were liable. It would be a question of fact in each case whether the particular conduct adopted in defence of person or property was reasonable in the circumstances. Obviously things which can be done in defence of human life are not permissible merely in defence of property.³

81. Plaintiff's assumption of risk in aid of another.—While the above are cases where the plaintiff acted to save himself from danger the law allows a person some liberty of action to save another in a position of great peril and fixes the responsibility for harm on the original wrongdoer who caused the peril, as where a person is injured or killed in his attempt to save a child in danger of being run over by a train in a level crossing negligently left unwatched.⁴ "The impulsive desire to save human life when in peril is one of the most beneficial instincts of humanity."⁵ In *Brandon v. Osborne, Garrett & Co.*,⁶ the plaintiff tried to pull her husband away from a piece of plateglass which fell on him from the roof of the defendant's shop, and strained and injured her leg in doing so. She was allowed to recover from the defendant. A ship was held justified in deviating from her course to save human life but not the cargo of another ship; and where a shipowner made a deviation for the latter purpose and the ship was lost, he was made liable to the owner of the goods who had chartered his ship.⁷ In *Haynes v. Hurwood*,⁸ a police constable rushed out from inside a police station to stop the horses of a van coming down unattended in a crowded street and eventually stopped them, sustaining injuries in

1. *Per James, L.J.*, at p. 223; see also *Brett, L.J.*, at p. 227. The wrong step was taken in the 'agony of the collision.'

2. (1890) 15 P.D. 15; see also *The Genua*, (1936) 2 A.E.R. 793; *The Oropesa*, (1943) P. 32 C.A.; *Summers v. Salford Corporation*, (1943) A.C. 283.

3. In *The Paludina*, (1927)* A.C. at p. 28, Lord Sumner doubted whether the rule would apply to protection of property; but see *per Lord Atkinson* in *Wilson v. United Counties Bank*, (1920) A.C. at p. 125.

4. For Scotch and American cases on this point, see *Beven, Negligence, Vol. I*, pp. 174 to 178; *Bohlen, Studies in Torts*, p. 569; *Kenny, Cases on Torts*, p. 569. This is spoken of as the Doctrine of Rescue.

5. *Per Cockburn, C.J.*, in *Scaramanga v. Stamp*, (1880) 5 C.P.D. 295, 304.

6. (1924) 1 K.B. 543.

7. *Scaramanga v. Stamp*, (1880) 5 C.P.D. 295, 304.

8. (1935) 1 K.B. 146.

doing so. It was held that he could recover from the owner of the van as the negligence of the latter's servant in charge of the van was really the cause of his injuries. In *Morgan v. Ayles*¹ the plaintiff, while escorting a child of 3½ years of age back to his house, ran to the rescue of the child which went a little ahead of her and was in danger of being knocked down by the defendant riding a motor cycle at over 20 miles per hour. The plaintiff was herself knocked down. She was held entitled to recover. But it would be otherwise if a person attempted to stop a runaway horse in a private field where there was no imminent danger to human life.²

82. Plaintiff's negligence a bar to his action.—The plaintiff's negligence would bar his recovery in two different types of cases: (a) where it is subsequent to and severable from the defendant's negligence, and (b) where it could not be avoided by the defendant.

83. Plaintiff's subsequent and severable negligence.—The plaintiff's omission to avoid the injury is a subsequent and severable negligence³ after the defendant had been negligent. In *Butterfield v. Forrester*,⁴ the defendant had put up a pole obstructing a highway and the plaintiff who was riding violently rode against it and was injured. He could have avoided it by use of care and so he could not recover. The same was the case where a person crossed a railway line in broad daylight without properly looking out for a passing train though the train did not whistle,⁵ or where a person got down from a train where there was no platform and fell down, when passengers had not been asked to alight, or had been asked to keep to their seats,⁶ where a person after stepping from a lift to the landing of an upper

1. (1942) 1 A.E.R. 489. See the note on this case in 58 L.Q.R. 299, 300; also 93 L.J. 115. Some interesting conundrums are (a) whether the defendant's liability to the rescuer would be affected by the contributory negligence of the rescued; (b) whether the rescuer can recover against the rescued person if the latter had been negligent; (c) whether the principle would apply to the rescue of things. The answer to these queries appears to be in the affirmative according to American decisions.

2. *Cutler v. United Dairies, Ltd.*, (1933) 2 K.B. 297.

3. A phrase used by Lord Birkenhead in *Admiralty Commissioners v. S.S. Volute*, (1922) 1 A.C. at p. 136.

4. (1809) 11 East. 60; for other illustrations see *Civilian Pacific Ry. Co. v. Frechette*, (1915) A.C. 871 (plaintiff, a brakeman, uncoupled waggons at night); *Earl of Harrington v. Derby Corporation*, (1905) 1 Ch. 205 (plaintiff filling his pond with water from river which had been polluted); *Glover v. L. & S.W. Ry. Co.*, (1867) L.R. 3 Q.B. 25 (loss of race glasses left by plaintiff in the train from which he was ejected wrongfully); *Dew v. United British Steamship Co.*, (1928) 139 L.T. 628 (workman in a ship falling into an open hatch when walking negligently in a passage dangerous to his knowledge); *The Egyptian*, (1910) A.C. 400; *Daniels v. Vaux*, (1938) 2 K.B. 203.

5. *Grand Trunk Ry. v. McAlpine*, (1913) A.C. 833; *Skellon v. L. & N.W. Ry. Co.*, (1867) L.R. 2 C.P. 631 (where there was no breach of duty of defendants at all).

6. *Sharpe v. Southern Ry. Co.*, (1925) 2 K.B. 311; see *Cildwell v. Glasgow Corporation*, (1936) S.C. 490 (passenger descending to step of moving tram-car and thrown off could not recover).

flat opened the door of the lift with his back turned to it and stepped into it, but as the lift was not in position, fell down and was injured,¹ where a ship having been injured in a collision due to the defendant's negligence went into port for repairs and set out again on a fresh voyage, without sufficient repairs having been done and was sunk.² Where the driver of a motor car or cycle is injured by running into the rear of another vehicle which is left unlighted in a street, the ordinary inference would be that he was negligent either because he failed to keep a proper look-out or because he drove at an excessive speed and could not pull up in time.³ But the dilemma⁴ is not inescapable and there may be circumstances justifying a different conclusion.⁵

84. **Plaintiff's negligence is not avoidable by the defendant.**—The plaintiff's negligence is proximate to the injury in the sense that there is no subsequent negligence of the defendant in not avoiding it. Such is the case of simultaneous negligence of both parties creating a situation in which neither can be considered negligent in not averting the accident. *A* and *B* drive their cars rashly and without lights on a dark night in opposite directions on a road and there is a collision. Neither can recover from the other. *A* drives a car at an excessive speed and *B* carelessly or being absent-minded gets into *A*'s way and is knocked down. *B* cannot complain; but he can if *A* was negligent in not stopping the car after *B* got into his way.⁶ In *Dowell v. General Steam Navigation Co.*,⁷ the plaintiff's sailing vessel withdrew the light and the defendant's steamer which was going at a great speed in a dark night collided with it. It was held that the plaintiff could not recover, as the defendant's steamer could not do anything to avoid the injury after she saw the plaintiff's vessel within a short distance. Similarly in the case of running down accidents and collisions on land or water, the negligent acts of both parties may come close upon one another and it would then be difficult for the plaintiff to prove that the defendant was negligent in not averting the situation due to the combined negligence of both.⁸

1. *Kerry v. Keighley Electrical Engineering Co.*, (1940) 3 A.E.R. 399 (C.A.)

2. *The Bruxellesville*, (1908) P. 312.

3. *Tart v. G. W. Chitty & Co.*, (1933) 2 K.B. 453; *Baker v. Longhurst & Sons, Ltd.*, (1933) 2 K.B. 461.

4. This class of cases has been therefore called "the dilemma cases"; Annual Survey of English Law, 1933, p. 147. But "a dilemma is not a safe method of settling a matter of fact," per Lord Wright in *McLean v. Bell*, (1932) 147 L.T. at p. 263.

5. *Tidy v. Battman*, (1934) 1 K.B. 319; *Stewart v. Hancock*, (1940) 2 A. E. R. 434 P.C.; 1940 P.C. 128; *Kanshi Kam v. Mrs. Roberts*, I.L.R. 1940 Lah. 135; 1939 Lah. 565. See *Ware v. Garson Haulage & Co. Ltd.*, (1944) 1 K.B. 30 (if it was night time and the obstruction could not be seen).

6. *McLean v. Bell*, (1932) 147 L.T. 262 (H.L.). 7. (1855) 5 E. & B. 198.

8. *Swadling v. Cooper*, (1931) A.C. 1; *Raymond v. Valence*, 63 M.L.J. 275; 1932 P.C. 95. For a similar case of maritime collision, see *Admiralty Commissioners v. S.S. Valuta*, (1922) 1 A.C. 129; below, para. 90.

It is of course otherwise if the defendant's negligence can be isolated as a later and severable cause.¹ The case of *Swadling v. Cooper*² is the former type. The defendant was driving his car at about thirty miles an hour on a main road when a motor cyclist came from a side road without warning and collided with the car and was killed. In an action by the representatives of the deceased a verdict in favour of the defendant was upheld by the House of Lords. The following passage³ from the judgment of Lord Hailsham states the rules applicable to collision cases but they would apply to others as well :—

"The law in these collision cases has long been settled. In order to succeed the plaintiff must establish that the defendant was negligent and that that negligence caused the collision of which he complains. If it is established from his own evidence, or by evidence adduced on behalf of the defendant, that the plaintiff could have avoided the collision by the exercise of reasonable care, then the plaintiff fails, because his injury is due to his own negligence in failing to take reasonable care. If, although the plaintiff was negligent, the defendant could have avoided the collision by the exercise of reasonable care, then it is the defendant's failure to take that reasonable care to which the resulting damage is due and the plaintiff is entitled to recover."

85. *Plaintiff's negligence not a bar to his action.*—The plaintiff can recover in spite of his own negligence, if he establishes that the defendant was guilty of a breach of duty to avoid the result of the plaintiff's negligence. This of course assumes that there is some initial negligence of the defendant; otherwise there is no cause of action.⁴ Whether there was a breach of this duty is a question of fact in each case, depending on the nature of the danger created by the defendant, his opportunity to avoid harm, and other circumstances. In *Davies v. Mann*, the plaintiff had left his donkey with its forefeet tethered in a public highway eight yards wide. It was grazing on a side of the road, when the defendant's waggon and horses coming down a slight descent at a smart pace ran against it and hurt it. The driver of the waggon was some distance behind the horses. The Court held that the driver's negligence was the proximate or immediate cause, as he was bound to go along at such a pace as would be likely to prevent mischief. In *Tuff v. Warman*,⁵ a case of maritime collision, the plaintiff's barge was sailing without keeping any look-out but the defendant's

1. *McLean v. Bell*, (1932) 147 L.T. 262 (H.L.); *Nani Bala v. Auckland Jute Co.*, (1925) I.L.R. 52 Cal. 602 (excessive speed of the defendant was the proximate cause). For a case of collision of aeroplanes, see *Cubitt v. Gower*, (1933) 47 Ll. L. Rep. 65.

2. (1931) A.C. 1; see also *Service v. Sundell* (1930) 99 L.J.K.B. 55 (collision between two cars coming from two main roads crossing at right angles, jury disagreed as to which of them was the real cause, fresh trial ordered). 3. (1931) A.C. at p. 8.

4. *E.g.*, *Skellon v. L. & N. W. Ry. Co.*, (1867) L.R. 2 C.P. 631. See also *Nunn v. Calcutta Tramways Co.*, (1929) I.L.R. 57 Cal. 309.

5. (1842) 10 M. & W. 546; see also *Krishna v. Dixit*, 1933 All. 214.

6. (1857) 2 C.B.N.S. 740; see also *Anglo-Newfoundland Development Co. v. Pacific Steam Navigation Co.*, (1924) A.C. 406.

steamer saw it at a distance of 300 yards. The defendant was held liable as he could have avoided the collision by reversing the engines. In *Radley v. L. & N. W. Ry. Co.*,¹ the plaintiffs, colliery owners, had a siding on the defendants' railway line where the plaintiffs' waggons were standing. One of them had on it another waggon which had been disabled, so that the two together were eleven feet high. Over the siding was a bridge eight feet high. The defendants brought in a very long train of the plaintiffs' empty waggons and pushed it on the siding. The disabled waggon went near the bridge, but could not pass under it with the result that the train stopped. Without looking into the cause of it, the defendants' servants gave momentum to the engine and the bridge was knocked down. The House of Lords was of opinion that the defendants could be held liable on the ground that their driver's negligence was the immediate cause, notwithstanding the previous negligence of the plaintiffs in leaving the waggon in that manner.

86. British Columbia Electric Ry. Co. v. Loach.—The decision of the Privy Council in this case² has been the subject of considerable controversy,³ but has now been declared by the House of Lords⁴ to be consistent with the rules enunciated in *Swadling v. Cooper*.⁵ The facts of the case were these. One Sands was taken by his friend Hall in a waggon. Hall drove it across a level crossing, when there was clear light and they could have seen an electric car of the defendants coming. They saw it when it was nearly on them, about fifty yards off. It knocked waggon, horses and men over and ran some distance beyond the level crossing before it stopped. Sands was killed and his representatives sued the defendants. It was proved that the car ran at an excessive speed of about 35 or 40 miles per hour and the driver of the car saw the horses about 400 feet from the level crossing and applied the brake which being, however, in a defective condition did not stop the car. It was held that the defendants were liable, because, assuming Sands was negligent in going on the line, the driver who saw him 400 feet off ought to have stopped the car and it was his breach of duty in not stopping the car that was the ultimate negligence. In discussing this case, it is well to recognise that it raises two distinct questions. The first is whether the plaintiff was negligent in not avoiding the accident, assuming that the driver of the car was negligent in not stopping the car. If he was, he could not recover. The decision proceeds

1. (1876) 1 A.C. 754. The H.L. held that the direction to the jury that the plaintiffs must satisfy them that the injury was caused without the plaintiffs' contributory negligence was wrong and sent the case back for retrial. 2. (1916) 1 A.C. 719.

3. See the criticism of Scrutton, L.J., in *Service v. Sundell*, (1929) 99 L.J.K.B. 55; see however, Pollock, Torts, (13th ed.) p. 490; Bohlen, Studies, p. 536.

4. Per Lord Wright in *McLean v. Bell*, (1932) 147 L.T. at p. 64. In this case the plaintiff on getting down from a tram-car crossed the tram line and was in the road when she was knocked down by a motor car. A verdict in her favour was upheld.

5. Above, para. 84.

on the basis that he was not.¹ This is a conclusion of fact and cannot be a precedent in other cases of running down accidents.² It would mainly depend on the time-factor, *viz.*, whether there was an interval of time in which either party could have avoided the accident.³ It would depend also on the position of the level crossing, the visibility of the train from a distance, and other circumstances. If, for instance, the train could be seen from a distance and the person run over was a pedestrian he may well be found guilty of negligence in not avoiding the result of the defendants' negligence in running the car without a brake.⁴ Here however the person killed was driven in another's waggon.⁵ The second point is whether the defendants were guilty of negligence or a breach of duty to Sands in not avoiding the result of the latter's negligence in going on the line without a proper look-out. The decision of the Privy Council in the affirmative does not appear open to objection.⁶ It is however another matter if phrases like 'last clear chance' or 'last opportunity,'⁷ were to be literally applied in all cases and understood to mean that there must be some 'new negligence' to make the defendants liable. If that is the law, it would lead to the anomaly that the defendants would be liable if they had provided a machine with a good brake but a bad driver who could not use the brake in time, but not if the machine was bad and the driver good.⁸ Similarly in *Davies v. Mann*,⁹ the defendant could have argued that he could not stop the horses as they were running too fast at the time or as he was walking at some distance behind the waggon.

87. Proper guide for applying the rule of contributory negligence.—The difficulties above referred to are avoided by adhering to

1. (1916) 1 A.C. at pp. 722-723.

2. In *Wellwood v. King*, (1921) 2 Ir. R. at p. 306, Ronan, L.J., said that this case was an express authority that wherever *A* has no look-out and *B* drives at an excessive speed, *B* is liable. This is not warranted by the case nor the opposite extreme suggested in *Service v. Sundell* and afterwards retracted by Scrutton, L.J., in *Cooper v. Swadling*, (1930) 1 K.B. 403, 410.

3. *Per* Maugham, L.J., in *Flower v. Ebbw Vale Steel Co.*, (1934) 2 K.B. at p. 151.

4. *E.g.*, *Grand Trunk Ry. v. McAlpine*, (1913) A.C. 838; *Mercer v. S. E. & C. Ry. Co.*, (1922) 2 K.B. 549; *Neenan v. Hosford*, (1920) 2 Ir. R. 258.

5. The contention seems possible though not raised, that there was no negligence of Sands at all, but only the combined negligence of Hall and the defendants.

6. *Cf.* *Pronk v. Winnipeg, etc., Ry. Co.*, (1933) A.C. 61 (electric car with insufficient light running down a person on the track).

7. These phrases were described by Lord Wright as 'refinements' applicable to some cases; 147 L.T. 264; 'the last chance' test was suggested by Scrutton, L.J., in *Dew v. United British Steamship Co.*, (1928) 139 L.T. 628 at p. 633.

8. (1916) 1 A.C. at p. 727; see *e.g.*, *Gaffney v. Dublin United Tramway Co.*, (1916) 2 Ir. R. 472 (where a deaf man was run over by a tram whose driver sounded the gong and shouted but did not use the brake and slacken the speed, defendants were held liable); *Smith v. Harris*, (1939) 3 A.E.R. 960, 964, *per* Scott, L.J.

9. (1842) 10 M. & W. 546; above, para. 85.

the formula, 'Was the defendant guilty of negligence or a breach of duty to avoid the result of the plaintiff's negligence?' There may be a breach of duty though due to anterior causes. In *Grayson v. Ellerson Line*,¹ there was a negligent omission of both parties, *viz.*, the shipowners and the repairers, to take steps to avert a fire accident. It was held that as the defendants were expert repairers in charge of a dangerous piece of work and brought the fire on the ship they had a special obligation in the matter, and were liable for breach of it. This case is instructive as it shows that in cases where the negligence of both parties was continuing and concurrent and contributed almost equally to the result, the incidence of duty would turn the scale. Sometimes the duty may be under statute. In *Bailey v. Geddes*,² a motorist was guilty of a breach of statutory duty under the Traffic Regulations which provide that the driver of every vehicle approaching a crossing shall, unless he can see that there is no foot passenger thereon, proceed at such a speed as to enable him to stop before reaching the crossing. He knocked down two foot passengers on the crossing who were hidden by a tram and lorry. It was held that as they were entitled in view of the regulations to assume that they could cross the road, it was no defence that they crossed the road without looking to see whether the road was clear. It is now settled law that the defence of contributory negligence is available in an action for breach of duty under statute or statutory rules like the Traffic Regulations as in an action for breach of duty imposed by any other statute like the Factory Acts.³

88. Contributory negligence of children.—The conduct of a child in bringing about its own injury may not be a conscious act of volition or may not be below the standard of care or judgment that can be expected of children.⁴ Therefore the defence of contributory negligence will be more difficult to make out against a child than against an adult. *Lynch v. Nurdin*⁵ is a well-known instance. But this does not mean that the way

1. (1920) A.C. 467, 477, *per* Lord Parmoor; (1919) 2 K.B. 514, 531, 537; above, para. 79.

2. (1938) 1 K.B. 156. But not if the plaintiff suddenly stepped off a footpath on to a pedestrian-crossing when it was clearly unsafe to do so; *Chisholm v. London Passenger Transport Board*, (1939) 1 K.B. 426; *Knight v. Sampson*, (1938) 3 A.E.R. 309; *Wilkinson v. Chetham-Strode*, (1940) 2 K.B. 310 C.A. See also the following cases: *Franklin v. Bristol Tramways and Carriage Co. Ltd.*, (1941) 1 K.B. 255 C.A. (cyclist while crossing road run over by bus coming from behind without bright head-lights as in ordinary times owing to black out, held cyclist was negligent in not trying to see if anything came from behind); *Joseph Eva Ltd. v. Reeves*, (1938) 2 K.B. 393 C.A. (driver entering crossing with lights in his favour and colliding with carriage, no contributory negligence); *Ward v. L. C. Co.*, (1938) 2 A.E.R. 341 (driver crossing against light signals, solely liable for collision); *William Ralph v. Robert Woodburn*, (1943) P.C. 110 (cyclist run over, though he was negligent, improper driving of defendant was sole cause).

3. *Sparks v. Edward Ash, Ltd.*, (1943) 1 K.B. 223, C.A.; below, Chap. XVIII, para. 9.

4. *Per* Channel, B., in *Gardner v. Grace*, (1858) 1 F. & F. 359; see the Scotch cases cited in Beven, *Negligence*, Vol. I, p. 133.

5. (1841) 1 Q.B. 29; above, Chap. VI, para. 11.

is clear for every action by an injured child. In the first place, there must be a duty towards the injured child. For instance an occupier of premises is bound to take care to avoid injury to a child meddling with a dangerous thing or trap in his premises, if the child was an invitee as in *Glasgow Corporation v. Taylor*,¹ or a licensee as in *Cooke v. Midland Ry. Co.*,² but not if the child was a trespasser as in *Addie v. Dumbreck*.³ In *Harrold v. Watney*,⁴ the defendant was held liable for keeping a public nuisance in the shape of a ruined fence near a highway and the plaintiff, a boy of four, being injured by putting his foot on it. But in *Barker v. Herbert*,⁵ a boy could not recover where he deviated from the highway into the defendant's land and was hurt by climbing over a fence. A person who employs children on dangerous work may be bound to take precautions against their carelessness, which would not be required in the case of adult workmen. A girl of seventeen employed in a soda water factory who failed to wear on her face the mask provided for workmen was held entitled to recover for the injury caused by the explosion of a bottle. It was held that the employer was bound to use special care by way of warning the plaintiff of the danger or insisting on her wearing it.⁶ Secondly, there must be a breach of duty, i.e., want of reasonable care to avert harm to a child. A boy aged seven who climbed on and fell off an unhorsed van left in a street by the defendants was held not entitled to recover.⁷ Similarly in another case, the plaintiff, aged five, who, when leaning over a motor car stationary on a highway, was bitten by a dog confined to the car by a leash could not recover against the owner of the car as the latter had warned the children nearby and the plaintiff had also been warned by her father not to approach the car.⁸ The mere fact that a child hurt itself by meddling with some object would not make it a trap, e.g., a heap of stones.⁹ There is no breach of duty if the defendant had a right or good reason to expect that a child is not left alone but is taken proper care of by some adult. The much discussed case of *Waite v. North Eastern Railway Co.*,¹⁰ may be explained on this ground. The plaintiff, an infant of the age of five years, was accompanied by his grandmother to a railway station where she bought a

1. (1922) 1 A.C. 44; above, para. 17. 2. (1909) A.C. 229; above, paras. 22, 26.

3. (1929) A.C. 358; above, paras. 22, 29.

4. (1898) 2 Q.B. 320; above, Chap. VI, para. 12; cf. *Hughes v. Macfie*, (1863) 2 H. & C. 744; *Jewson v. Gatti*, (1885) 1 T.L.R. 635; 2 T.L.R. 381, 441.

5. (1911) 2 K.B. 653; above, Chap. VI, para. 13.

6. *Crocker v. Banks*, (1888) 4 T.L.R. 324; see also *Grissle v. Frost*, (1863) 3 F. & F. 622; *Robinson v. Smith*, (1901) 17 T.L.R. 423; *Stimpson v. Standard Telephones*, (1940) 1 K.B. 342 C.A.

7. *Donovan v. Union Cartage Co., Ltd.*, (1933) 2 K.B. 71, F.N.

8. *Sycamore v. Lay*, (1932) 147 L.T. 342; see also *Bailey v. Neal*, (1888) 5 T.L.R. 20.

9. *Latham v. Johnson*, (1913) 1 K.B. 398; above, para. 26.

10. (1859) E.B. & E. 719; see *Oliver v. Birmingham and Midland Omnibus Co.*, (1933) 1 K.B. 35; below, para. 89.

ticket for herself and a half-ticket for the plaintiff. She and the plaintiff began to cross the line to go to the platform from which their train was to start. While doing so, they were run over by a train, and she was killed and the plaintiff was injured. The defendants were held not liable. If the action was considered as one in contract, then the contract was subject to the condition that the person in charge of the plaintiff would take proper care. If it was in tort, the defendants were not liable, because either there was no breach of duty to the plaintiff whom they had a right to expect to be in proper custody, or if there was a breach of duty in not warning the grandmother of approaching trains at the time, that was not, but her negligence was, the proximate and direct cause. Similarly in another case,¹ the plaintiff, a boy of four, went with his sister to the defendant's house. On account of defective railings on the side of the steps leading to the house, the plaintiff when getting up, fell into the area below and was injured. He had been asked to stop at the bottom of the steps while his sister went into the house. It was held that the plaintiff was only invited to come in the charge of others and the steps were not a trap or concealed danger. The case of *Jayammal v. M. & S. M. Ry. Co.*² decided by the Madras High Court may be explained on a similar ground. The plaintiff, a girl five years old, was attempting to cross in day-time a railway line at a spot where the village people were in the habit of going. She put her foot on one of the rails when an engine was coming at a distance of about four or five feet from her, and was run over and injured. It was held that she could not recover, because, assuming that there was a licence to people to cross the line, a child incapable of appreciating the danger was not expected to go there without being taken care of by others and there was no breach of duty of the defendants. If she was capable of appreciating the danger, her negligence was the proximate cause and not the negligence of the defendants' servants in not keeping a look-out for adults or children.³

89. Negligence imputed to the plaintiff.—When the plaintiff has not been personally guilty of negligence, it is still imputed to him if his injury is due to the negligence of his servants or agents,⁴ but not of an independent contractor.⁵ In *Thorogood v. Bryan*,⁶ a strange doctrine

1. *Burchell v. Hickisson*, (1880) 50 L.J.Q.B. 101. 2. (1924) I.L.R. 48 Mad. 417.

3. *Per* Srinivasa Iyengar, J., at p. 442; the other learned judge, Spencer, O.C.J., found no negligence of defendants at all and the question of contributory negligence would not then arise.

4. *Per* Lord Watson in *The Bernina or Mills v. Armstrong*, (1888) 13 A.C. 1 at p. 16; 12 P.D. 58; but not of a compulsory pilot, *Spaight v. Tedcastle*, (1881) 6 A.C. 217.

5. *Per* Lord Esher in 12 P.D. at p. 74.

6. (1849) 8 C.B. 115; action by the representative of a person killed by being run over by the defendant's bus. His bus had set him down in the middle of the road instead of drawing up at the kerb and before he could get out of the way he was run over. Action failed.

known as "the doctrine of identification" was propounded. A passenger in an omnibus was said to be so far identified with the owner of the omnibus and his servants, that if he was injured in a carriage collision and sued the owner of the other carriage for the negligence of his driver, the negligence of the driver of the bus in which he was travelling would be a good defence against him. This doctrine was applied in a few cases¹ but was overruled by the well-known case of *The Bernina*,² on the ground that it was devoid of any reason or principle. Some of the cases which adopted it are supportable on other grounds. In *Waite v. North Eastern Railway Co.*,³ there was a dictum that the child was identified with the grandmother, but the decision was rested on other grounds already referred to and is therefore still good law. In the absence of such grounds the decision would not be followed at the present day. Thus in *Oliver v. Birmingham and Midland Omnibus Co.*,⁴ the plaintiff, a child aged four, was crossing a road with his grandfather who was holding his hand. They had reached the middle of the road when the grandfather was startled by the approach of the defendants' omnibus and released the child's hand and jumped aside to a place of safety. The child was struck down and injured. It was held that the driver was negligent and the child could recover. In *Child v. Hearn*,⁵ the plaintiff, a servant of a railway company, was injured by a trolley on which he was going, being upset by pigs which escaped from the defendants' land into the railway line. It was held that he could not recover, as he was identified with his employer, but the decision itself can be explained on the ground that the direct cause of his injury was the breach of statutory duty of the railway company to keep a proper fence, and not the negligence of the defendant in not keeping his pigs within bounds. The principle of *The Bernina* was followed in a Rangoon case,⁶ where a person who was riding a car with the leave of its owner was hurt by the collision of that car with another owing to the negligence of the drivers of both cars. It was held that the injured person was not barred from suing the driver of the other car by reason of the negligence of the driver of the car he was riding.

90. **Maritime collisions.**—The Admiralty Courts solved the problem of causation in cases of collisions due to the fault of the colliding ships in a different way from the Courts of common law. According to the

1. *Child v. Hearn*, (1874) L.R. 9 Ex. 176; *Armstrong v. L. & Y. Ry. Co.*, (1875) L.R. 10 Ex. 47; See Beven, Vol. I, p. 233.

2. Also known as *Mills v. Armstrong*, (1888) 13 A.C. 1; 12 P.D. 58, a case notable for some very readable judgments on the law of negligence. In *Hellwood v. King*, (1921) 2 Ir. R. 274, an attempt to resurrect the doctrine was made but failed ultimately. See *Krishnaswami v. Narayanan*, 1939 Mad. 261.

3. (1859) E.B. & E. 719; above, para 88.

4. (1933) 1 K.B. 35.

5. (1874) L.R. 9 Ex. 176.

6. *Papachristopoulos v. Corrie*, 1933 Rang. 235 (P.C.); (1932) 101 L.J.P.C. 65.

latter, the plaintiff cannot recover if he was equally in fault with the defendant or could have avoided the result of the defendant's negligence. The Admiralty Courts in such cases divided the loss equally¹; that is, each party would get half of his damages from the other. This was said to be due to the peculiar difficulties in ascertaining the proximate cause of a maritime collision.² The Maritime Conventions Act, 1911,³ introduced a new principle of division, *viz.*, in proportion to the respective fault of both ships. But the Admiralty Courts agreed with the common law Courts on two matters: first, according to the "*Bywell Castle rule*",⁴ the ship whose negligent act creates a dangerous situation in which another makes a mistake "in the agony of the collision," is solely liable for the result; secondly, in circumstances like those of *Davies v. Mann*,⁵ there is no contributory fault of both, but only one party is at fault and he bears all the loss. The principle of division is applicable, not to these cases, but only to those where the ships can be considered to have contributed by their negligence to the collision. The following rules were formulated by Lord Birkenhead in his famous judgment in *Admiralty Commissioners v. S. S. Voluta*,⁶ which is the leading authority on this subject:

(i) If the negligence of both ships is synchronous or simultaneous, *e.g.*, where two ships sail in opposite directions with great speed and come into collision,⁷ then both contribute to the loss and divide it. In the common law neither recovers from the other.

(ii) If the negligence of ship *A* is subsequent to that of ship *B*, but is so much mixed up with the state of things brought about by the first negligent act of *B* that *A* might invoke the prior negligence of *B* as being part of the cause of the collision, it is a case of contribution.⁸ The facts of

1. *Per* Lord Stowell (then Sir W. Scott), *The Woodrop Sims*, (1815) 2 Dods. 83, 86. As to the origin of the rule, see Marsden, *Collisions at Sea*, Ch. VI. It does not apply where two ships are to blame for a collision with a third which can recover her whole loss from either or both of them; *The Devonshire*, (1912) A.C. 634.

2. *The Hero*, (1911) P. 128 at p. 145, *per* Evans, P.; see also *per* Lord Shaw in *The Drumlanrig*, (1911) A.C. at p. 27. The rule has been called a *judicium rusticum*.

3. 1 & 2 Geo. 5, c. 57, S. 1. As to apportionment, see below, Chap. XIX, para. 4. For general principles, see *The Heranger*, 1939 A.C. 94.

4. Above, para. 80.

5. Above, para. 85.

6. (1922) 1 A.C. 129; it has received very high praise; see *per* Lord Finlay and Lord Shaw in (1922) 1 A.C. at p. 145; *per* Scrutton, L.J., in *Dew v. United British Steamship Co.*, (1928) 139 L.T. at p. 633, "a supreme contribution to our classical jurisprudence"; see also *The Eurymedon*, (1938) 1 A.E.R. 122 (C.A.), where Greer, L.J., lays down the rules arising from the principle of *Davies v. Mann*. See also *Yousaf Sagar v. S. S. Ellora*, I.L.R. 1940 Kar. 53; 1939 Sind. 349.

7. *E.g.*, *The Voorwarts*, (1880) 5 A.C. 876; *S. S. Leopold v. Hochelaga Steamship Co., Ltd.*, 1932 P.C. 65; *The Eurymedon* above; *American Mail Line, Ltd. v. The Afrika*, 1937 P.C. 168.

8. (1922) 1 A.C. 129 at p. 144.

Admiralty Commissioners v. S. S. Volute,¹ illustrate this type of cases. The *S. S. Volute* was the leader of a convoy with the *S. S. Radstock* on the starboard and another vessel on the port-hand. After a certain point the *Volute* had to change her course and did so without giving a signal as she was bound to do. On discovering the *Volute's* change of course to starboard the *Radstock* hard-a-ported but her helm jammed, and she then increased her speed with the result that a collision occurred. It was held that both vessels were to blame. Though their negligent acts were successive, there was not a sufficient separation of time, place or circumstance between them to make it right to treat the action of the *Radstock* in going full steam ahead as the sole cause of the collision. In *Dowell v. General Steam Navigation Co.*,² the plaintiff, a sailing vessel, failed in a common law court as being guilty of proximate negligence; but in Admiralty, the defendant, would have been regarded as contributory to the accident and a division of the loss would have been ordered.³

(iii) Where the first negligence only brought about a state of things in which there would have been no danger or damage if a subsequent and severable negligent act had not been committed,⁴ as in *Davies v. Mann*, the first negligence is not deemed to have any causal connection with the injury at all.⁵ For instance, a barge which was improperly navigated came into collision with a schooner which was carrying its anchor over her bows in a dangerous way, and the anchor hit the barge and made a hole in it. The bad navigation of the barge was the only cause and so there was no division.⁶ In these cases, the common law courts also agree in making one alone liable.

Since the Judicature Act, 1873,⁷ these rules which were in force only in the Court of Admiralty govern actions for damages for maritime collisions in any Court. One effect of the Admiralty rule is that the owner of the cargo in one of the ships can recover only half of his loss from the owner of the other ship which caused the collision⁸, to that extent there is in effect a partial identification of the owner of the cargo and the shipowner, though the doctrine of identification has not been invoked in this context. But damages for loss of life or personal injuries due to the collision are not subject to this rule and can be recovered from either

1. Above; see also *The Hero*, (1911) P. 128.

2. (1855) 5 E. & B. 195, above, para. 84.

3. (1922) 1 A.C. at p. 140.

4. (1922) 1 A.C. at p. 136.

5. *Spaight v. Tedcastle*, (1881) 6 A.C. at p. 219, per Lord Selborne; *Anglo-Newfoundland Development Co. v. Pacific Steam Navigation Co.*, (1924) A.C. 406; *The Rabenfels*, (1929) I.L.R. 56 Cal. 763.

6. *The Monte Rosa*, (1893) P. 23; distinguishing *The Margaret*, (1881) 6 P.D. 76; where the anchor could not be seen at night.

7. S. 25, sub-S. 9, superseded by the Maritime Conventions Act, 1911, S. 9.

8. *The Drumlanrig*, (1911) A.C. 16.

of the ships at fault or both, jointly and severally,¹ and where they are recovered from one or more of the shipowners, there is a right of contribution between them, equally before 1911, and after 1911, according to their respective degrees of fault.²

91. Effect of the Law Reform Act, 1935.—The rule denying relief to a person guilty of contributory negligence is analogous to that denying contribution to a joint wrongdoer. In either case one of two joint wrongdoers bears the whole burden of the damage or loss resulting from their conduct. In England the latter rule has been abrogated by the Law Reform Act, 1935,³ and a court can now apportion the loss among joint wrongdoers according to their respective fault, as in cases of maritime collisions. It appears as if this change would affect the former rule also. If *A* and *B* by their negligence cause harm to *C* and the loss due to their negligence can be apportioned among them, the argument in favour of adopting a different rule making one of them bear the whole loss when it is sustained by either of them and not by *C*, a third party, has become considerably weaker. In 1939 the Law Revision Committee under the Chairmanship of Lord Wright recommended the abolition of the common law rule and the enactment in its place of the rule of apportionment of blame prevailing in the case of maritime collisions since 1911. In *Sparks v. Edward Ash Ltd.*,⁴ Scott, L.J., referred to "the harsh and often cruel bearing of our common law doctrine of contributory negligence" and to the need for an early reform on the above lines by legislation.

92. Causation in the law of torts and the law of crimes.—The principles of responsibility for punishment in the law of crimes naturally differ in important respects from that for reparation in the law of torts. In the first place the criminal law selects for punishment only a few grave crimes which are attended with serious injury or risk of injury to person and property and does not concern itself with various wrongs for which reparation can be obtained in a civil court. For instance under the Indian Penal Code it is not an offence to cause a private nuisance, *e.g.*, subsidence of land by excavation by an adjoining owner, discomfort by noise or smell, obstruction of ancient lights, or to cause pecuniary loss by slander of title or procuring a breach of contract. Therefore the problem of causation in the criminal law arises in a more limited sphere than that in the law of torts. Secondly, the criminal law insists on a high degree of moral blame before a person could be punished; for instance, under the Indian Penal Code,

1. *The Bernina*, (1888) 13 A.C. 1; see also Maritime Conventions Act, S. 2.

2. Maritime Conventions Act, S. 3. Costs need not be divided in the same proportion as damages; *The Salabangka*, (1943) P. 13.

3. Below, Chap. XIX, para. 29. As to appellate court varying distribution of blame, below, Chap. XIX, para. 4. 4. (1943) 1 K.B. 223 at p. 230. See 59 L.Q.R. 1.

intention to cause bodily harm or knowledge of its likelihood is an essential ingredient in the offence of hurt.¹ Similarly negligence which may be actionable and involve civil liability for certain consequences may not be culpable enough to be a criminal offence². On the other hand, the standard of care in the law of actionable negligence is wholly objective and does not take note of the state of mind or even the mental deficiencies of the individual. Besides, once a person is found guilty of negligence, he may have to pay compensation for consequences which may not be foreseeable at all. For instance, the defendant in *Dixon v. Bell*, could not have been punished for a crime but was liable for a tort.³ In cases of nervous shock as in *Hambrook v. Stokes*,⁴ the facts constitute a civil wrong but not a criminal offence. On the other hand, if the conduct of the wrongdoer is blameworthy, he is punished though he may not be civilly liable. For instance, a person who causes the death of another by a rash and negligent act is liable for a crime though the person killed was also negligent; on such facts the former may have a defence of contributory negligence in a civil action.⁵

93. Causation in the law of torts and the law of contracts.—The rule of causation in the law of torts is also determined by different considerations from those in the law of contracts. In the former the guiding principle is to find out whether the defendant should in justice be made to pay for results which he did not intend. In the latter the principle is whether the defendant undertook to pay for them by the terms of the contract. If he did, he is liable for them, though, apart from contract, he may not be liable. When the contract is silent, the court would infer a liability to pay in accordance with the presumed intention of the parties. In making this inference the court naturally has regard to what the party in breach should reasonably be made to pay, in other words, to considerations similar to those which govern the problem of causation in the law of torts.⁶ The rules on this subject were formulated in England in the leading case of *Hadley v. Baxendale*,⁷ and in India in similar terms by the Indian Contract Act.⁸ Under this Act, a party who breaks a contract must pay compensation for the consequences which naturally arise in the usual course of things from the breach, or which the parties knew, when they made the contract, to be likely to arise from the breach. The first rule which is the general

1. S. 321.

2. *E.g., Akerley v. R.*, (1943) 1 A.E.R. 367 P.C.

3. Above, para. 46. See Mayne, *Crl. Law*, p. 157; 1 *East P.C.* 265.

4. (1925) 1 K.B. 141; above, Chap. II, para. 6.

5. Above, para. 77.

6. *East Suffolk Rivers Catchment Board v. Kent*, (1941) A.C. at pp. 92, 93, *per* Lord Atkin; *The Noting Hill*, (1884) 9 P.D. 105, 113, *per* Brett, L.J.; *Weld-Blundell v. Stephens*, (1920) A.C. at p. 979; *Karibasavanna v. Veerabhadrappa*, (1912) I.L.R. 36 Mad. 580, 582; *Maksood Alam v. Badhu Sahu*, 1938 Pat. 561.

7. (1854) 9 Ex. 341; on this subject, see Mayne, *Damages*, Chap. II; "Measure of Damages in Contract and Tort" by Justice Sir S.L. Porter in 5 *Cam. L.J.* p. 176.

8. S. 73.

one is substantially similar to the rule applicable to a tort and would yield similar results in cases where the wrong is both a breach of contract and a tort. For instance, in the case of *In re Polemis*,¹ the defendants, charterers of a ship, were held liable to the owner for the loss due to negligence, but the result would have been the same if the action was regarded as one for breach of the contract of charterparty.² Similarly, if a carrier commits a breach of duty to deliver the goods safely and without unreasonable delay, or negligently causes damage to person or property,³ or if a vendor sells an article which is dangerous or unfit for use,⁴ the measure of damages will be the same whether the action is in tort or in contract. Damages in an action by a landlord against a tenant for holding over would be the same as in an action of ejectment and mesne profits against a stranger-trespasser.⁵ The principle of contributory negligence that the plaintiff cannot complain of damage which he could have avoided or mitigated is applicable also to an action for breach of contract.⁶ The second rule has a special meaning in relation to breach of contract and enables the party aggrieved by the breach to recover compensation for loss arising from special circumstances relating to him if the party liable for the breach had notice of such circumstances but not otherwise. Thus if a vendor fails to supply the goods, or a carrier to deliver them, the party aggrieved can recover for the loss arising from his inability to perform a contract which he had entered into with a third party for sale of the goods only if the vendor or carrier had notice of that fact. In *The Arpad*,⁷ the plaintiff who was a consignee of wheat from Germany in the defendant's ship claimed in tort for conversion and also for breach of contract for short delivery of a quantity of wheat which had been mixed with barley in the course of the voyage. It was held that the damages in either case would be the same, *viz.*, the difference between the price at which the plaintiff had purchased the wheat in Germany and the price at which he could sell it on the date of delivery. His claim on the basis that he had contracted to sell the wheat at a little over his purchase price was

1. (1921) 3 K.B. 560; above, para. 64.

2. See Dr. Winfield's Note on Damages in Salmond, *Law of Contracts*, p. 506; 5 Camb. L.J. at p. 190.

3. *The Argentina*, (1889) 14 A.C. 519, 523; *Admiralty Commissioners v. S.S. Chekiang*, (1926) A.C. 637; in *Hobbs v. L. & S. W. Ry. Co.*, (1875) L.R. 10 Q.B. 111, the plaintiff and his wife were stranded in a railway station on a cold night; damages were awarded for inconvenience suffered but not for the illness of the wife due to her catching a cold on the ground that it was too remote; this is of doubtful correctness; see *McMahon v. Field*, (1881) L.R. 7 Q.B. 561, 696.

4. *Smith v. Green*, (1875) 1 C.P.D. 92. See above, para. 54.

5. *Sundermull v. Ladhuram*, (1928) I.L.R. 50 Cal. 667.

6. *British Westinghouse, etc., Co., Ltd. v. Underground Electric Co.*, (1912) A.C. 673, 689; *Ansett v. Marshall*, (1853) 22 L.J.Q.B. 118; *Baldwin v. L.C.D. Ry. Co.*, (1882) 9 Q.B.D. 582; *Le Blanche v. I. & N. W. Ry. Co.*, (1876) 1 C.P.D. 286; *Vaile Bros. v. Hobson*, (1933) 149 L.T. 283; *King v. Southern Camden Power Co.*, 1937 A.C. 319.

7. (1934) P. 189.

disallowed, as there was no proof that the defendant had notice of this circumstance. If, however, the defendant had notice, his liability for a breach of contract may be larger than that for a tort by reason of the second rule aforesaid.

93-A. Causation in other cases.—The problem of causation in cases where a person commits a wrongful act and sets certain natural or human agencies in motion has been so far discussed. The problem would have a different aspect in cases where there is no question of any responsibility for a wrongful act. *Smith v. Davey Paxman & Co.*¹ decided recently by the Court of Appeal is an interesting illustration. In the last week of July 1942, a German aeroplane crashed at a place in Essex and boys employed in the appellant's workshop looking for souvenirs found a cannon shell which passing through various hands came into the possession of a workman in the shop called Marriott a week afterwards. On the 12th August Marriott was sawing the shell when it exploded and killed him and seriously injured the applicant Smith, who applied for compensation under the Workmen's Compensation Act. The defence of the employers among others was that by reason of the Personal Injuries (Emergency Provisions) Act, 1939, which exempted employers from paying compensation for war injuries by providing for its payment from the State, they were not liable. "War injuries" were defined by the Act as "injuries (a) caused/by (i) the discharge of any missile or (ii) the use of any weapon, explosive or noxious thing either by the enemy or in combating the enemy;..... or (b) caused by the impact on any person or property of any enemy aircraft—or anything dropped from any such aircraft." The Court of Appeal held that the injury to the applicant was not caused by the discharge of a missile by the enemy within the meaning of the Act but was the result of a number of intervening agencies operating independently and severing the causal relation between the two events. If, on the other hand, the person who discharged the shell were sued in a court of law his responsibility for the actual consequences which followed could hardly be questioned. In the absence of any such responsibility the question of causation became one of logical sequence rather than of moral responsibility. On the question of logical sequence the following observations would be of interest. Scott, L.J., observed that if the shell that was discharged was a delayed time-fuse bomb, the position might be different. In such a case or case of a deliberately conceived "booby trap" dropped from an aeroplane, the intention inferable from the use of such missiles would provide a causal nexus between the enemy act and the final injury resulting from the explosion, and there would be a continuing chain of causation between the two. But here the result was not only remote from the cause, but the chain of causation

1. (1943) 1 A.E.R. 286 C.A.

was definitely severed by a series of fortuitous interventions by curious boys or men acting for their own purposes. The argument that the resulting injury was a war injury because if the enemy had never used the shell in question it would have never reached England or Marriott's possession just as it may be said that if the Germans had never invaded Poland and there had been no war, this accident would never have happened, could not be accepted, because as De Parcq, L.J. said, these causes are remote and to adopt such a construction would make nonsense of the Act.

94. Burden of proof.—The general rule is that the plaintiff must establish a breach of duty and its causal connection with his injury.¹ If he fails to prove either of them, his action fails.² The mere proof of some injury is not enough³; Lord Halsbury remarked in a case where a man was found run over on a railway line, "What is there to show that the train ran over him rather than he ran against the train?"⁴ To this rule, actions against bailees,⁵ carriers by land⁶ or sea,⁷ and railway companies,⁸ for loss of or damage to goods entrusted to them are exceptions⁹; the onus is on them to prove that the loss or damage was not due to their negligence. Another exception is that if the facts proved or admitted amount to *prima facie* evidence of negligence or its causal connection, the burden is shifted to the defendant to rebut these points. The question of *prima facie* evidence or onus of proof is generally immaterial where there is evidence on both sides.¹⁰ But it becomes important where the defendant does not offer rebutting evidence or the evidence on either side is scanty or obscure as

1. As to quantum of proof, see *Dawson v. Murex Ltd.*, (1942) 1 A.E.R. 483 C.A. A conviction of defendant for negligence in a criminal court is not evidence nor the statement of the driver of the plaintiff's car before his death; *Hollington v. Hawthorn & Co.*, (1943) 1 K.B.D. 587 C.A. See also *Robinson v. Stern*, (1939) 2 K.B. 260; *Burr v. Ware R.D.C.*, (1939) 2 A.E.R. 688 C.A.

2. *Wakelin v. L. & S. W. Ry. Co.*, (1886) 12 A.C. 41 at pp. 45, 47; *Raymond v. Valence*, 1932 P.C. 95; 63 M.L.J. 275.

3. *Simson v. London General Omnibus Co.*, (1873) L.R. 8 C.P. 390, 392.

4. *Wakelin v. L. & S. W. Ry. Co.*, (1886) 12 A.C. 41 at pp. 45, 47.

5. Ss. 151, 152, Indian Contract Act; See *Kush Kanta v. Chandra Kanta*, (1923) 28 C.W.N. 1041; *Dwarkanath v. Rivers Steam Navigation Co.*, (1917) 27 C.L.J. 615 (P.C.); 8 L.W. 4. 6. Indian Carriers Act, S. 9.

7. Carriage of Goods by Sea Act (XXVI of 1925); see also *India General Steam Navigation Co. v. Bhagwan Chandra*, (1913) I.L.R. 40 Cal. 716; *India General Navigation & Ry. Co. v. Eastern Assam Co.*, (1920) I.L.R. 47 Cal. 1027; *Dekhari Tea Co. v. Assam-Bengal Ry. Co.*, (1919) 23 C.W.N. 998; *Akhil Chandra v. India General Navigation & Ry. Co.*, (1915) 21 C.L.J. 565; *Sesham Patter v. Moss*, (1894) I.L.R. 17 Mad. 445; *Erufuli v. Thaha Ummal*, (1924) I.L.R. 47 Mad. 610.

8. Ss. 72, 76, Indian Railways Act.

9. In Manitoba (Canada) a statute lays the onus on the owner of a motor vehicle causing injury to a person. For a case decided under the statute, see *Winnipeg Electric Co. v. Geel*, (1932) A.C. 690. See also 13 Can. Bar. Review, pp. 545, 565.

10. *East Indian Ry. Co. v. Kirkwood*, (1919) I.L.R. 48 Cal. 757 at p. 761.

often happens in many cases of serious accidents.¹ In England, it has an additional importance. It is a question of law for the judge to decide before he submits the case to the jury.² If he holds that there is no such evidence, then he cannot send the case to the jury but must direct a non-suit. The judge's power in this regard is intended as a check on the notorious bias of juries in favour of the plaintiffs in such actions.³ It is a well-known remark that juries are always biassed when a pretty woman or a railway company happens to be a litigant.⁴ There is a large body of case-law in England on the subject of what is sufficient *prima facie* evidence in different sets of facts. The evidence must be more consistent with the defendant's negligence than otherwise and not merely consistent with it. If the facts are consistent with either hypothesis, the plaintiff fails.⁵ But it is not necessary that they should exclude the defendant's innocence.

95. *Res ipsa loquitur*.—In certain cases, the mere fact of the injury or accident is *prima facie* evidence of negligence. It is usual to refer to such cases by a latin phrase, *res ipsa loquitur*,⁶ the thing itself speaks. The leading illustration is *Scott v. London Dock Co.*,⁷ where the plaintiff, a customs officer, went into the defendants' docks on business and in passing from one doorway to another six bags of sugar which were hung by a chain fell on him. It was held that on these facts negligence of the defendants' servants could be inferred. The rule applicable to such cases was stated thus:

"Where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care."

96. Illustrations of *prima facie* evidence of negligence.—The following are some instances of *prima facie* evidence of negligence.

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1. *McArthur v. Dominion Cartridge Co.*, (1905) A.C. 72.
 2. *Metropolitan Ry. Co. v. Jackson*, (1877) 3 A.C. 193; *Bunbury v. Bank of Montreal*, (1918) A.C. 626, 670.
 3. *Per Erie, C.J.*, in *Cotton v. Wood*, (1860) 8 C.B.N.S. 568, 573; *Holmes*, Common Law, pp. 115-129.
 4. *Holdsworth*, Vol. I, p. 347; above, Chap. II, page 38, note 4.
 5. *Cotton v. Wood*, (1860) 8 C.B.N.S. 568; *Wakelin v. L. & S. W. Ry. Co.*, (1886) 12 A.C. 41.
 6. Lord Shaw said of it, "If the phrase had not been in Latin, no one would have called it a principle"; *Ballard v. N. British Ry. Co.*, (1923) S.C. (H.L.) at p. 56.
 7. (1865) 3 H. & C. 566; cf. *Fawkes v. Foulson*, (1892) 8 T.L.R. 725 (the defendant was found to have discharged the onus in a case where bales were let down by a crane and fell on the plaintiff). See the remarks of Prof. Bohlen, as to the distinction that ought to be made in casting the onus on the defendant between proof of facts within his knowledge and proof of absence of his negligence: 50 Har. L.R. at pp. 1239, 1240.

Where a person going along a highway was injured by the fall of a barrel of flour from out of the window of the defendant's warehouse,¹ or by the fall of a brick from the defendant's railway bridge²; where the defendant's horse dashed through a street with his cart unattended by any person³; where the defendant's horse while drawing an omnibus kicked and hurt a passenger and the panel showed marks of kicks⁴; where injury was caused by a collision of two trains belonging to the same company,⁵ by the derailment of a railway carriage,⁶ by the sudden and violent stopping⁷ or starting of a train,⁸ or where a spark from the engine set fire to the plaintiff's premises near the railway line⁹; where a ship collided while in motion with a ship at anchor¹⁰; where an injury was caused by breach of statutory regulations regarding the use of explosives in a mine,¹¹ or the safety of the plant in a factory¹²; where the defendant's motor car left unattended on a road went down-hill presumably by the interference of a third person¹³; where a motor car collided with a lamp-post on the side of a road,¹⁴ or brushed against the branches of an overhanging tree in a road,¹⁵ or injured a person on the footpath beside a road,¹⁶ or dashed into a shop-window adjoining a highway¹⁷; where in a collision between two ships one of them had committed a breach of statutory regulations,¹⁸ or in a collision of carriages on the road, the rules of the road were not observed by one of

1. *Byrne v. Boodle*, (1863) 2 H. & C. 722; see also *Briggs v. Oliver*, (1866) 35 L.J. Ex. 163.

2. *Kearney v. L. B. & S. C. Ry. Co.*, (1870) 5 Q.B. 411; see also *Kupppammal v. M.S.M. Ry. Co.*, I.L.R. 1938 Mad. 238; 1938 Mad. 117 (fall of a wall).

3. *Gayler v. Davies*, (1924) 2 K.B. 75; *Tolhausen v. Davies*, (1888) 57 L.J.Q.B. 392; *Deen v. Davies*, (1935) 2 K.B. 282.

4. *Simson v. L.G. Omnibus Co.*, (1873) I.L.R. 8 C.P. 390.

5. *Skinner v. L. B. & S. C. Ry. Co.*, (1850) 5 Ex. 787; *Carpue v. L. B. & S. C. Ry. Co.*, (1844) 5 Q.B. 747.

6. *Flannery v. Waterford & Limerick Ry. Co.*, (1877) Ir. R.11 C.L. 30; *Bird v. G.N. Ry. Co.*, (1858) 28 L.J. Ex. 3; *E.I.R. Co. v. Kirkwood*, (1919) I.L.R. 48 Cal. 757 P.C.; *Jewan Ram v. E.I. Ry. Co.*, (1924) I.L.R. 51 Cal. 861.

7. *Angus v. L. T. & S. Ry. Co.*, (1906) 22 T.L.R. 222.

8. *Metropolitan Ry. Co. v. Delaney*, (1921) 90 L.J.K.B. 721.

9. *Secretary of State for India v. Dwarka Prasad*, 1927 All. 349.

10. *The Annot Lyle*, (1886) 11 P.D. 114; *The Indus*, (1886) 12 P.D. 46; *The Valdes*, (1915) 31 T.L.R. 144; *Rivers Steam Navigation Co. v. Ram Kanai*, (1936) 40 C.W.N. 633; 1936 Cal. 152.

11. *David v. Britannic Merthyr Coal Co.*, (1910) A.C. 74; sometimes the mere compliance with a regulation is not enough proof of the common law duty of care; e.g., *Windle v. Bristol Tramways Co.*, (1917) 86 L.J.K.B. 936 (compliance with rule requiring one light for a light locomotive not enough, as two lights were necessary in the circumstances).

12. *Dawson v. Murex Ltd.*, (1942) 1 A.E.R. 483 C.A.

13. *Parker v. Miller*, (1926) 42 T.L.R. 408.

14. *Issac Walton v. Vanguard Motorbus Co.*, (1908) 25 T.L.R. 13; *Barnes U.D.C. v. London General Omnibus Co.*, (1908) 100 L.T. 115; *Baifnath Shaw v. Corporation of Calcutta*, (1932) 36 C.W.N. 1147.

15. *Radby v. London Passenger Transport Board*, (1942) 1 A.E.R. 433.

16. *Ellor v. Selfridge*, (1930) 46 T.L.R. 236; *McGowan v. Stott*, (1930) 99 L.J.K.B. 357; *Laurie v. Raglan Building Co.*, (1942) 1 K.B. 152 C.A.; cf. *Hunter v. Wright*, (1938) 2 A.E.R. 621 C.A. (where on the facts the defendant was held to have rebutted the presumption of negligence).

17. *Gayler v. Pope*, (1924) 2 K.B. 75 at p. 85, per McCordie, J.

18. *Marsden, Collisions at Sea*, p. 5; *The Fenham*, (1870) L.R. 3 P.C. 212; see *Rivers Steam Navigation Co. v. Ram Kanai*, above.

them,¹ or where an aeroplane soon after taking off from the ground and going to a height of about 100 ft., crashed to the ground²; where the plaintiff contracted dermatitis on wearing³ a suit of clothes cleaned by defendants,³ where a surgeon left a swab inside a patient after an operation⁴, where the lessee of a house used it for storing fire-works and there was an explosion resulting in the house being gutted⁵, where the plaintiff's yacht broke adrift from the defendants' moorings let by them to the plaintiff and the yacht became a total loss and the accident was caused by the mooring chain parting through kinking and the kinking was due to the failure of a swivel to work effectively owing to rust and marine growth⁶.

97. Illustrations of absence of *prima facie* evidence of negligence.—On the other hand, it was held that there was no *prima facie* evidence of negligence in the following cases.

Where a horse while being driven on a highway bolted, as horses are known to do so, without any want of care of the driver;⁷ where a new and untried horse on which the defendant was riding swerved and knocked a person on the footpath;⁸ where the wheels of a carriage came off and the horses were frightened and bolted and a person in the carriage was thrown down;⁹ where a heavy motor lorry of the defendants skidded on a road which was greasy owing to the rains;¹⁰ while the plaintiff was working near his employer's house divided by a passage from the defendant's house, a ladder inside the defendant's house from some unexplained cause, fell on an upper window and broke it, and the glass in falling hurt the plaintiff's eye; there was nothing to connect the accident with the defendant in the way of his trade or the management of his household and the ladder probably fell by the interference of some persons unknown;¹¹ where a passenger in a railway station while looking at a time-table suspended on a wall was hurt by the fall of a wooden plank and zinc roll through a hole in the roof which was presumably being repaired by a contractor;¹² where in the course of works carried on over the defendant's

1. *Alexander v. Anderson*, (1933) N. I. 158.

2. *Fosbrooke-Hobbs v. Airwork, Ltd.*, (1937) 1 A.E.R. 108.

3. *Mayne v. Silvermore Cleaners Ltd.*, (1939) 1 A.E.R. 693; cf. *Griffiths v. Peter Conway Ltd.*, (1939) 1 A.E.R. 685 (where there was evidence of abnormality of plaintiff's skin to disprove negligence).

4. *Mahon v. Osborne*, (1939) 2 K.B. 14. See *Sabapathi v. Huntley*, 1938 P.C. 91; above, para. 5.

5. *Mahomed Rowther v. Shanmugasundaram*, (1943) 1 M.L.J. 188; see also *Narasimha Iyer v. Alu Iyer*, 1940 Mad. 722; *Deputy Lal v. Reoti Prasad*, 1941 All. 327.

6. *The Quercus*, (1943) P. 96.

7. *Mansoni v. Douglas*, (1880) 6 Q.B.D. 145.

8. *Hammack v. White*, (1862) 11 C.B.N.S. 588. It would be otherwise if it was a crowded place where a horse was newly tried; see *Michael v. Alestree*, below, para. 101.

9. *Moffatt v. Bateman*, (1869) L.R. 3 P.C. 115.

10. *Wing v. London General Omnibus Co.*, (1909) 2 K.B. 652, 663; see also *Hunter v. Wright*, (1938) 2 A.E.R. 631; see however *McGowan v. Stott*, (1930) 99 L.J.K.B. 357, 359, 360. As to the accident being due to a defect in a vehicle, like a wheel coming off, see *Lilly v. Tilling*, (1912) 57 Sol. Jo. 59 (C.A.); mere proof of skidding is neutral and will not displace a presumption of negligence; *Lowrie v. Raglan Building Co.*, (1942) 1 K.B. 152.

11. *Higgs v. Maynard*, (1866) 14 L.T.N.S. 332; cf. *Cole v. De Trafford*, (No. 2), (1918) 2 K.B. 523.

12. *Welfire v. Brighton Ry. Co.*, (1869) L.R. 4 Q.B. 693; it would be otherwise if a thing fell on a highway as the lamp in *Tarry v. Ashton*, (1876) 1 Q.B.D. 314, and a contractor's fault is then no defence.

railway line by an independent authority, a girder fell on a passing train and injured a passenger in it¹; where an electric fan in a restaurant fell on a guest sitting at a table², where the plaintiff, a passenger, while on the platform of a railway station was bit by an unknown dog which had appeared there an hour before and been kicked out by a porter;³ where a piece of projecting cornice fell on the plaintiff who went to the defendant's house to collect money due to him as it was not shown that the defendant was aware or ought to have been aware of the defect;⁴ where a black-board which a pupil-teacher was using fell down and hurt one of the scholars owing to the pegs of the easel not fitting well;⁵ where a pupil inside a school of which the defendant was headmaster was injured by a golf-ball hit by a fellow pupil from an adjoining playground;⁶ where a prisoner was burnt to death by some unaccountable fire in a cell where there was no stove and no matches.⁷

98. Illustrations of prima facie evidence of causation or absence of it.—Similarly on the question of causal connection, the following are some illustrations of the application of the principle:—

It was held that where two ships collided, the stranding of one of them soon after could be treated as the result of the collision.⁸ On the other hand in *Metropolitan Ry. Co. v. Jackson*,⁹ the plaintiff alleged that the servants of the defendants, a railway company, allowed the carriage in which he was seated to become overcrowded and he got up and went to the door to prevent more passengers entering it. Just then the train started and he put his hand on the door lintel, when a porter closed the door from outside and the plaintiff's fingers were caught and crushed. It was held that there was no evidence of a causal connection between the negligence of the defendant in allowing overcrowding and the plaintiff's injury.

99. Burden of proof of causation.—When the plaintiff proves initial negligence of the defendant, it is for the defendant to prove that the causal connection was interrupted by a third party's or the plaintiff's own negligence.¹⁰ But if the plaintiff's case itself discloses such facts, it is for him to make out the continuance of the causal relation, and unless he does so, the defendant is not called upon to establish a defence like contributory negligence.¹¹

100. Illustrations of prima facie evidence of contributory negligence or absence of it.—The following are some illustrations of

1. *Daniel v. Metropolitan Ry. Co.*, (1871) L.R. 5 H.L. 45.

2. *Cates v. Mongini*, (1917) 19 Bom. L.R. 778.

3. *Smith v. G. E. Ry. Co.*, (1868) L.R. 2 C.P. 4.

4. *Pritchard v. Peto*, (1917) 2 K. B. 173; see *Pauline v. Cassamalli*, 1 L. R. 58 Bom. 189; 1933 Bom. 465 Above, Chap. VI. para. 13.

5. *Crisp v. Thomas*, (1890) 63 L. T. 756.

6. *Langham v. Governors of Wellingborough School*, (1932) 101 L. J. K. B. 513; above, para. 46. 7. *McKenzie v. Chilliwack Corporation*, (1912) A.C. 888.

8. *The Paludina*, (1925) P. 40, 50. See *Rivers Steam Navigation Co. v. Bijoy Kumar*, 1941 Pat. 250 (collision with submerged snag in river, inevitable accident.)

9. (1877) 3 A.C. 193.

10. *Smith v. L. & S. W. Ry. Co.*, (1871) L.R. 6 C.P. 2.

11. *Wakelin v. L. & S. W. Ry. Co.*, (1886) 12 A. C. at pp. 47, 48; *Davey v. L. & S. W. Ry. Co.*, (1893) 12 Q. B. D. 70.

prima facie evidence of contributory negligence or the absence of such evidence.

In *Bridges v. North London Ry. Co.*,¹ it was held that the facts negated contributory negligence. The name of a railway station was called out and immediately afterwards passengers were told to keep to their seats. A passenger in the last carriage which stood off the platform attempted to get down and fell on a heap of hard rubbish near his carriage. It was then dark and he was near-sighted. It was held that the calling out of the name of the station amounted to an invitation to alight and was *prima facie* evidence of the negligence of the railway company being the cause of the injury. In *North Eastern Railway Co. v. Wanless*,² a level crossing gate being open was held to be a notice to the public that the line was then safe for crossing and a person who attempted to cross the line and was injured by a passing train could recover. In *Dublin, Wicklow and Wexford Ry. Co. v. Slattery*,³ where a person who had to cross the line near a railway station for buying a ticket was run over by an express train at night-time, it was held that evidence to the effect that the train entered the station without whistling as required by the rules, was *prima facie* enough to go to a jury. In *Jelley v. Ilford B.C.*⁴ the fact that a person walking in a highway and collided with a stationary object (a pile of sand bags) during a black-out and hurt her eye was held to speak for itself and to evidence her contributory negligence. On the other hand in *Cotton v. Wood*,⁵ it was held that the fact that the driver of the defendant's omnibus who was driving at a moderate pace and on the proper side of the road, was seen to have turned back to speak to the conductor was not enough to show that his want of care was the cause of a person being knocked down by the bus. In *Hutchinson v. L. & N. E. Ry. Co.*⁶ the fact that three persons working on a railway line were run over by an express train would not furnish any evidence of their contributory negligence. In *Wakelin v. L. & S. W. Ry. Co.*,⁷ the facts that a person was found dead at night on a railway line in a level-crossing and the train did not whistle were not by themselves proof of any negligence of the railway company or its causal connection with the accident. In *Lewis v. Denye*⁸ the infringement by the plaintiff, an infant, 16½ years old, and employed in a dangerous work, of a statutory regulation was held *prima facie* evidence of his negligence.

101. Historical development of the law of negligence.—The principles of liability for negligence came late into the English law.⁹ The Roman law had several centuries before developed its rules as to *culpa*, and notwithstanding their adoption by mediaeval writers like Bracton, English courts preferred to grope along and find

1. (1874) L.R. 7 H.L. 213; see also *Sharpe v. Southern Railway Co.*, (1925) 2 K.B. 311.

2. (1874) L.R. 7 H.L. 12; see also *Daya Shankar v. B. B. & C. I. Ry. Co.*, 53 All. 943; 1931 All. 740; *B.N.W. Ry. Co. v. Matukdhari*, (1937) I.L.R. 16 Pat. 672; 1937 Pat. 599.

3. (1877) 3 A.C. 1155; *Davey v. L. & S. W. Ry. Co.*, (1883) 12 Q.B.D. 70; 11 Q.B.D. 213; see also *Smith v. S. E. Ry. Co.*, (1896) 1 Q.B. 178.

5. (1860) 8 C.B.N.S. 568.

6. (1942) 1 A.E.R. 330 C.A.

7. (1886) 12 A.C. 41. For other illustrations see *Mersey Docks and Harbour Board, v. Procter*, (1923) A.C. 253; *Kearney v. Great Southern and Western Ry.*, (1868) 18 L.R. Ir. 303; *Delany v. Dublin United Tramways Co.*, (1892) 30 L.R. Ir. 725; cf. *Cullen v. Dublin United Tramways Co.*, (1920) 2 Ir. R. 63; *Jones v. G.W.Ry. Co.*, (1930) 47 T.L.R. 39.

8. (1940) A.C. 921 (H.L.); see also *Wood v. L.C.C.*, (1941) 2 K.B. 232 C.A.

9. On this subject, see P. & M., Vol. II, p. 470; Holdsworth, Vol. II, p. 50; Vol. III, p. 375; Vol. VIII, p. 445; Wigmore, Anglo-American Essays on Legal History, p. 474; Selected Essays on Torts, p. 1; Street, Vol. I, Chap. XIII; Winfield, 42 L.Q.R. 37, 184; Winfield and Goodhart, 49 L.Q.R. 359.

their own way. The Anglo-Saxon laws¹ were too crude and primitive to make distinctions between intention, negligence and accident. They belong to a stage of civilisation when the 'blood-feud' and 'noxa surrender' were in vogue, and liability to suffer vengeance at the hands of the injured or his kindred or to make reparation to them was determined by the instincts of vengeance and superstition rather than by notions of culpability known to a later age. This must be understood with the reservation that in a simple and rough age the injuries for which punishment or reparation was demanded would be mostly acts of intentional violence and where they were unintentional, they would have been the result of obviously dangerous acts.² By the thirteenth century, the King's courts had been established and their procedure had come under the influence of more civilised ideas. The result of this influence appeared first in the sphere of criminal responsibility when self-defence or misadventure was recognised as a ground for pardon, and later, as a ground of defence. In course of time, civil liability in trespass was also mitigated by such defences as self-defence, act of God, act of a third party, plaintiff's own fault; but the notion that misadventure or inevitable accident was no excuse lingered long. This phenomenon has been already explained and had the effect of retarding the growth of the doctrine of negligence. The doctrine however made its way into the law by an indirect and circuitous route. The defences of act of God or act of a third party were pleaded under the issue of 'not guilty' by way of showing that the trespass was not directly or proximately connected with the defendant's act. At a later time they were specially pleaded. The recognition of these grounds of defence and the consequential inquiry into the directness or proximity of damage naturally directed attention to the question of want of care in causing the damage. But it was really the actions on the case that made a definite contribution to the law of negligence. In these actions it was considered necessary on the analogy of the action of trespass to show that the act complained of was unlawful. This was done by alleging that the act was a breach of some duty recognised by law, *e.g.*, duty of a common carrier under the custom of the realm to receive goods and carry them safely, duty of a landowner under prescription to provide a fence, duty of a public officer like a sheriff to return a summons. The next step was to regard an assumpsit or undertaking as sufficient to found a cause of action for breach of duty, as in the old actions against a bailee, farrier or artificer.³ It is obvious that in these actions the modern concept of negligence lay hidden under mediaeval trappings. By the seventeenth century it had begun to assume its modern form and terminology. In 1601⁴ Coke used the word 'negligence' in connection with the loss of goods by a bailee. In the famous case of *Coggs v. Bernard*,⁵ it became the subject of a great deal of discussion. The next and last stage in the evolution of liability for negligence was when an action on the case was allowed against a person who caused damage not merely by breach of a duty imposed by law, custom or prescription, or undertaken by him, but by an improper or negligent performance of his projects and undertakings.⁶ In *Michael v. Alestree*,⁷ a person who tried an unruly horse near a thoroughfare was held liable on the ground that "it was his fault to bring a wild horse into such a place where mischief might probably be done by reason of the concourse of people." Thus, through the actions on the case the law got the principle that

1. Above, Chap. I, paras. 5, 8, 11 and Chap. IV, para. 45.

2. With regard to some of these acts, the Anglo-Saxon laws attempted to define the degree of care, *e.g.*, as to carrying spears; below, Chap. XV, para. 14.

3. Above, Chap. I, para. 12.

4. *Countess of Shrewsbury's case*, 5 Co. Rep. 13b.

5. (1703) 2 Ld. Raym. 909; 1 Sm. L.C. 197; above, paras. 5 and 61.

6. Street, Vol. I, p. 189.

7. (1676) 1 Vent. 295.

negligence was a breach of duty of care towards the plaintiff, and its corollary that when there is neither duty nor breach, the harm suffered is inevitable accident which creates no liability. From these principles certain cases like cattle-trespass stood out as exceptions but were co-ordinated into a single category by Justice Blackburn in *Rylands v. Fletcher*.¹ Alongside of the development of these principles the standard of care was also gradually evolved. The enquiry into the proximity of the damage directed attention to the character of the damage instead of the culpability of the actor and accounts for the objective test that the damage should be such as could have been foreseen by a prudent person. This test was implicit in the older authorities and formulated by Tindal, C.J., in *Vaughan v. Menlove*.² The further development of the law on this subject by way of analysing the issues of negligence and causation and distinguishing between the tests applicable to them is the work of judges and writers within the last fifty years during which a great deal of study has been devoted to this topic in England and the United States.

1. Above, Chap. VI, paras. 64 and 83.

2. (1837) 3 Bing. N. C. 468; above, para. 3.

CHAPTER XV.

ABSOLUTE LIABILITY.

1. **Absolute liability.**—This phrase has come into vogue in the modern law of torts to mean liability without fault, *i.e.*, without intention or negligence. Liability of this kind is exceptional under the common law as the ordinary rule is that a person is liable only for harm due to his intention or negligence and not for other kinds of harm which would be merely inevitable accident. Except where it is a relic of history as in the case of trespass to land,¹ such liability rests on the principle that a person engaging in an ultra-hazardous work or activity from which injury to others is likely to result notwithstanding his reasonable care should pay for such injury. The principle has not been formulated in this broad form in the cases of absolute liability in England,² as they have come into the law at different times and in varying forms. But they will, however, on examination be found to rest ultimately on some such principle of policy. For instance, the rule as to cattle-trespass,³ one of the oldest cases of absolute liability, is capable of this explanation. A person who keeps cattle may not be able with reasonable care to prevent their straying and doing damage occasionally to his neighbour's crops but it is just and conducive to the interests of agriculture that he should pay for the damage. The rule as to vicarious liability of employers,⁴ one of the modern instances of absolute liability, can be similarly explained. Employing servants or agents in business or industry is in present conditions necessarily attended with risk of injury due to their negligence or mischief which their employer cannot avoid with all possible care and he is therefore regarded as an insurer of others against such injury. A similar reason also lies behind his liability to his workmen under the Workmen's Compensation Act.⁵

2. Instances of absolute liability under the common law.—

(i) Liability of common carriers and innkeepers for loss of goods entrusted to them. This will be presently considered. (ii) Liability for trespass by entry on land. This is only absolute in name but not in reality and is explained by historical reasons.⁶ (iii) Cattle-trespass.⁷ (iv) Liability for conversion under the rule in *Hollins v. Fowler*.⁸ (v) Subsidence of adjoining

1. Above, Chap. IV, para. 19.

2. It has been formulated in the Draft Restatement, 1935, Chap. 20. "An ultra-hazardous activity is one which (i) necessarily involves a risk of serious harm to person or property which cannot be eliminated by the exercise of the utmost care and (ii) is not a matter of common usage;" § 520. Instances are the use of explosives for blasting, drilling of oil wells resulting in oil overflowing and injuring lower lands. Acts of God or of man are not defences; see above, Chap. VI, paras. 80 and 81.

3. Above, Chap. IV, para. 24.

4. Below, Chap. XVI, para. 15.

5. Above, Chap. II, para. 8.

6. Above, Chap. IV, para. 19.

7. Above, Chap. IV, para. 24.

8. Above, Chap. V, para. 54.

land due to excavation on one's own land.¹ (vi) The rule in *Rylands v. Fletcher*.² We have seen that the liability under it is not wholly absolute or independent of negligence. (vii) The rule in *Hulton v. Jones*.³ (viii) Employers' liability for wrongs of their servants. It is discussed in the next Chapter.

3. Instances of absolute liability under statute.—(a) Liability of employers under the Workmen's Compensation Act.⁴ (b) Liability of the owner of aircraft in England under the Air Navigation Act.⁵ These two Acts have been noticed in the Chapter on bodily harm, but the latter of them applies to damage to property as well as to person caused by the flight of aircraft. The tendency of modern legislation is in the direction of making liability absolute in the case of dangerous works, but legislation like the Factories Acts adopts also the alternative method of regulating the management of such works and defining in detail the standard of care required in particular cases.⁶

4. Rules of strict liability.—In certain cases the duty of care is personal to the actor in the sense that he will be liable for the want of care of an independent contractor. This however is quite different from saying that the liability for breach of this duty is absolute or independent of care. Instances of such duties are those of an occupier of premises to an invitee,⁷ of persons doing work on or near a highway to avoid creating a nuisance.⁸ These and other instances will be considered later.⁹

5. Common carriers.—A common carrier is a person engaged in the business of transporting for hire property from place to place by land, water or air¹⁰ for all persons indiscriminately.¹¹ A railway company or the proprietor of a stage-coach is a common carrier on land. The owner of a 'general ship,'¹² i.e., a ship which offers to carry for all persons during a particular voyage, is a common carrier on water. If he retains control of the ship, he is a common carrier even though he lets it out under a contract or charterparty to another.¹³ The charterer is in law the carrier if he has

1. Above, Chap. VI, para. 28.

2. Above, Chap. VI, paras. 64 and 83. Dr. Winfield regards it only as 'strict liability'; Law of Tort, Chap. XIX. 3. Above Chap. VII, paras. 17 and 18.

4. Above, Chap. II, para. 8.

5. Above, Chap. II, para. 10.

6. Below, Chap. XVII, para. 2. Cf. The German Civil Code as regards liability of railway companies and owners of factories for personal injuries; Schuster, German Civil Law, pp. 159, 344. 7. Above, Chap. XIV, para. 18.

8. Above, Chap. VI, paras. 13 and 14.

9. Below, Chap. XVI, Para. 6.

10. *Aslan v. Imperial Airways, Ltd.*, (1933) 149 L.T. 276; *Westminster Bank, Ltd. v. Imperial Airways, Ltd.*, (1936) 155 L.T. 86; *Philipson v. Imperial Airways Ltd.*, (1938) 1 A.E.R. 759; see also McNair, Law of the Air, p. 114.

11. Indian Carriers Act, III of 1865, S. 2.

12. *Morse v. Sluz*, (1671) 1 Ventr. 190, 238; 2 Lev. 69.

13. *Fenton v. Dublin Steam Packet Co.*, (1838) 3 L.J.Q.B. 28.

the control.¹ A mere carrier of passengers, *e.g.*, the owner of a taxi-car is not a common carrier, though he will be liable as such in respect of the goods or luggage of a passenger.² A person who carries another's goods by special contract and does not profess to carry the goods of any member of the public,³ and a forwarding agent who merely collects goods for transmission by railway⁴ are not common carriers. The Postmaster-General in England⁵, and the Government of India⁶ are not common carriers in respect of the letters or goods carried.

6. **Liability of a common carrier.**—Under the common law of England, or as it was said, "the custom of the realm," the common carrier has certain special obligations. In the first place he is bound to receive goods tendered for carriage,⁷ and is liable in damages for refusing to do so without lawful justification,⁸ *e.g.*, non-payment of reasonable hire, inconvenience like want of room, unfitness or dangerous character of the goods to be carried. Secondly, he is liable to answer for the loss of or damage to the goods accepted for carriage in all events except the act of God, the act of the King's enemies, or inherent defect in the goods carried.⁹ Besides these special defences he may rely on general defences. Thus, on the ground of imminent necessity, a shipowner is not liable if he had to jettison or throw overboard cargo for saving other cargo or the ship itself

1. *Calvin v. Newberry*, (1830) 8 B. & C. 166; see also the Carriage of Goods by Sea Act, XXVI of 1925, Art. 1 (a).

2. *Macrow v. G. W. Ry. Co.*, (1871) L.R. 6 Q.B. 612, 618; *G. W. Ry. Co. v. Bunch*, (1888) 13 A. C. 31; *Wilkinson v. L. & Y. Ry. Co.*, (1907) 2 K.B. 222; *Chinger v. S. E. Ry. Co.*, (1922) 38 T.L.R. 678; *Vosper v. G. W. Ry. Co.*, (1928) 1 K.B. 340; *India General Navigation & Ry. Co. v. Gopal Chandra*, (1913) I.L.R. 41 Cal. 80; 17 C.W.N. 970; *Velayat Hossein v. Bengal & N. W. Ry. Co.*, (1909) I.L.R. 36 Cal. 819; 13 C.W.N. 847.

3. *Liver Alkali Co. v. Johnson*, (1872) L.R. 9 Ex. 338; *Ingate v. Christie*, (1840) 3 C. & K. 61; *Fagan v. Green*, (1926) 1 K.B. 102; *Belfast Ropework Co. v. Bushell*, (1918) 1 K.B. 210; *G. N. Ry. Co. v. L. E. P. Transport*, (1922) 2 K. B. 742; *India General Navigation & Ry. Co. v. Dekhari Tea Co.*, (1923) I.L.R. 51 Cal. 304 (P.C.): 51 I.A. 28; *Dhar v. Ahmad Bux* (1933) I.L.R. 60 Cal. 879; 37 C.W.N. 559.

4. *Sutton v. Ciceri*, (1890) 15 A.C. 144; *Aldridge v. G. W. Ry. Co.*, (1864) 15 C. B. N. S. 582; *Nugent v. Smith*, (1876) 1 C.P.D. 19, 423.

5. *Lane v. Cotton*, (1701) 1 Ld. Raym. 646.

6. Indian Carriers Act, S. 2; *Alamgir Footwear Co. v. Secretary of State*, 1933 All. 466; 1933 A.L.J. 796.

7. *G. N. Ry. Co. v. L. E. P. Transport*, (1922) 2 K.B. 742, 753; *Johnson v. Midland Ry. Co.*, (1849) 4 Ex. 367; *G. W. Ry. Co. v. Sutton*, (1869) L.R. 4 H.L. at p. 237. He is, however, bound only to carry goods which he usually professes to carry.

8. *Crouch v. L. & N. W. Ry. Co.*, (1854) 14 C.B. 255; he is also liable to indictment; *Possi v. Shipton*, (1838) 1 P. & D. 21. The duty is also to receive a passenger; *Clarke v. West Ham Corporation*, (1909) 2 K.B. 858.

9. *Forward v. Pittard*, (1785) 1 T.R. 27, 33; *Dhar v. Ahmad Bux*, (1933) I.L.R. 60 Cal. 879; 37 C.W.N. 559. It is on the carrier to make out these defences; *above*, p. 467.

in a storm.¹ A carrier can plead the plaintiff's fault, *e.g.*, damage due to improper packing,² or fraud, as where a consignor conceals the value³ or the nature⁴ of the goods or avoids payment of fare.⁵ But he cannot rely on the defence of inevitable accident or plead that there was no want of due care. Unlike a private carrier of goods or a carrier of passengers, he is liable, as on an absolute warranty of fitness of the carriage or the seaworthiness of a ship,⁶ for loss or damage due to latent defects not discoverable by due care. He is also liable for loss happening without his fault, as by a theft or robbery. He is not however liable for pecuniary loss sustained by the owner owing to unavoidable delay in the carriage or delivery of the goods unless it amounts to a breach of any express contract.⁷ His absolute liability begins when he receives the goods preparatory to their carriage and continues when he keeps them during the transit or after arrival and pending delivery.⁸ But where the carriage is over and the goods arrive at their destination, he is thereafter liable as an ordinary bailee and not as a common carrier, if he has given notice to the consignee and the latter has delayed or refused to take delivery.⁹

7. **Act of God.**—The phrase 'act of God' was defined in *Nugent v. Smith*,¹⁰ as an accident that is due to natural causes directly and exclusively without human intervention and that could not be prevented or averted by the exercise of reasonable care. In that case a shipowner was sued for the loss of the plaintiff's mare which being shaken during a storm got so frightened that it struggled and hurt itself and died. He was held not liable because the damage was due to an act of God and also the inherent defect or vice of the thing carried. A tempest,¹¹ a cyclone,¹² an unusual fall of snow,¹³ a fire caused by lightning,¹⁴ have been held acts of God; but not a fire due to an act of man, a theft, a robbery, or an accident in the course of navigation to which natural causes

1. The right of the owner of the jettisoned cargo is only to claim general average contribution from the owners of the cargo saved including the ship itself; *Carver, Carriage of Goods by Sea*, pp. 18, 515; see also *Sims & Co. v. Midland Ry.*, (1913) 1 K.B. 103; *Springer v. G. W. Ry. Co.*, (1921) 1 K.B. 257.

2. *G. W. Ry. Co. v. Bunch*, (1838) 13 A.C. 31.

3. *Miles v. Cattle*, (1830) 6 Bing. 743; *M'Cance v. L. & N. W. Ry. Co.*, 7 H. & N. 477.

4. *Cahill v. L. & N. W. Ry. Co.*, (1861) 10 C.B.N.S. 154.

5. *Keys v. Belfast Ry. Co.*, (1859) Ir. R. 8 C. L. 167; 9 H.L.C. 556.

6. *Dixon v. Sadler*, (1839) 5 M. & W. 414; 8 M. & W. 895.

7. *Taylor v. G. N. Ry. Co.*, (1868) L.R. 1 C.P. 385.

8. *Mitchell v. Lanc. & Y. Ry. Co.*, (1875) L.R. 10 Q.B. 260.

9. *Chapman v. G. W. Ry. Co.*, (1880) 5 Q.B.D. 282.

10. (1876) 1 C.P.D. 423, at p. 444, *per* James, L.J.

11. *Nugent v. Smith*, above; *River Wear Commissioners v. Adamson*, (1877) 2 A.C. 743.

12. *Surendra v. Secretary of State*, (1916) 25 C.L.J. 37; 33 I.C. 702.

13. *Bridson v. G. N. Ry. Co.*, (1858) 28 L.J. Ex. 51.

14. *Forward v. Pittard*, (1785) 1 T.R. 27.

might also have contributed as where a vessel was steered on to a shoal during a fog.¹ The defence here is therefore narrower than in the case of absolute liability under *Rylands v. Fletcher*.² The liability of the common carrier for loss due to theft or robbery was originally rested on the rule of the mediaeval common law that a bailee was absolutely liable to the bailor because he alone could sue the thief³ or other person who took away the goods. On the other hand where the loss was due to natural causes or the act of the King's enemies the bailor could sue none and the bailee was therefore not liable to the bailor. In *Coggs v. Bernard*,⁴ Holt, C.J., abandoned the mediaeval rule as regards bailees in general and held that they were liable only for negligence; but he retained it for common carriers on a ground of policy, viz., that otherwise they would collude with thieves and robbers and bring about loss to the owners. A century hence, Lord Mansfield held in *Forward v. Pittard*,⁵ that a shipowner was liable for loss due to an accidental fire and was in the nature of an insurer against accidents other than such well-known occurrences like a tempest or an earthquake. He observed that such a rule was required "for preventing litigation and the necessity of going into circumstances impossible to be unravelled." In a later case,⁶ Best, C.J., observed that it would be dangerous to allow the defence of inevitable accident to a carrier because he and his servants who would usually be the only witnesses could easily disprove negligence and escape liability; but there was no such danger in allowing proof of such occurrences as a storm known to a large number of people. In that way the scope of the defence of 'act of God' underwent a process of contraction to suit new grounds of policy. The rule of liability of the common carrier is an interesting instance of the observation of Holmes that "ancient rules are often maintained by new reasons more fitted to the time being found for them, and they gradually receive a new content, and at last a new form, from the grounds to which they have been transplanted."⁷

8. **King's enemies.**—The phrase refers to public enemies with whom the Sovereign is at war,⁸ but not to private depredators, or robbers.⁹ But pirates at sea are regarded as public enemies.¹⁰ A riot or insurrection on land is not an act of the King's enemies,¹¹ unless it assumes the proportions of

1. *Liver Alkali Co. v. Johnson*, (1874) L.R. 7 Ex. 267; 9 Ex. 338.

2. Above, Chap. VI, para. 80.

3. On this subject, see Holdsworth, Vol. III, p. 343; Holmes, Common Law, 96.

4. (1703) 2 Ld. Raym. 909; 1 Sm. L.C. 175. 5. (1785) 1 T.R. 27.

6. *Riley v. Horne*, (1828) 5 Bing. 217, 220.

7. Common Law, p. 36.

8. *Russell v. Niemann*, (1864) 17 C.B.N.S. 171.

9. *The Marshal's case*, Y.B. 33, Hen. 6, 1, pl. 3.

10. *Beven*, Negligence, Vol. II, pp. 1068, 1069.

11. Per Lord Mansfield in *Forward v. Pittard*, above.

actual belligerency.¹ This defence like the others is not of any avail, if the loss caused by the King's enemies was due partly or wholly to the carrier's negligence² or other wrongful act, *e.g.*, his deviation from the usual way.³

9. **Inherent defect in the thing carried.**—A carrier was held not liable where a bullock escaped from a railway truck without the fault of the carrier and was killed,⁴ or where a mare was injured by struggling from fright in a storm.⁵ He is not liable for the ordinary wear and tear of the goods in transportation, decay of fruits, spontaneous combustion of articles, the breakdown of a railway engine in transit,⁶ damage due to sending imperfectly packed goods,⁷ dangerous goods entrusted without notice of their danger and the precautions required to carry them.⁸

10. **Liability of common carriers in India.**—The above rule of absolute liability of common carriers has been held to apply in India also.⁹

11. **Limitation of liability of common carriers.**—Both in England¹⁰ and in India¹¹ the liability of common carriers has been modified by statute with the result that except in special cases their liability is only for negligence.¹² Besides it is in practice limited by special contracts¹³ between the parties, *e.g.*, bills of lading or notices or advertisements put up by the carrier.

1. Like the Irish rebellion; *Curtis v. Mathews*, (1918) 2 K.B. 825; (1919) 1 K. B. 425; or the Irish republican army; *Secretary of State for War v. M. G. W. Ry.*, (1923) 2 Ir. R. 102.

2. *Phillips v. Clark*, (1867) 2 C. B. N. S. 156, 164.

3. *James Morrison & Co. v. Shaw Savill & Co.*, (1916) 2 K.B. 783.

4. *Blower v. G. W. Ry. Co.*, (1872) L.R. 7 C.P. 655; see also *Richardson v. N. E. Ry. Co.*, (1872) L.R. 7 C.P. 75; *Kendall v. L. & S. W. Ry. Co.* (1872) L.R. 7 Ex. 373.

5. *Nugent v. Smith*, (1876) 1 C.P.D. 423; see also *Kendall v. L. & S. W. Ry. Co.*, above; *Richardson v. N. E. Ry. Co.*, above.

6. *Johnson v. N. E. Ry. Co.*, (1888) 5 T.L.R. 68.

7. *Barbour v. S. E. Ry. Co.*, (1876) 34 L.T. 67; *Gould v. S. E. & Chat. Ry.* (1920) 2 K. B. 186, 191, 192; *Baldwin v. L. C. & D. Ry. Co.*, (1892) 9 Q.B.D. 582.

8. *Brass v. Maitland*, (1856) 6 E. & B. 470.

9. *Irrawaddy Flotilla Co. v. Bugwandas*, (1891) I.L.R. 18 Cal. 620, 625 (P.C.); 18 I.A. 121; *Kumber v. British India Steam Navigation Co.*, (1913) I.L.R. 38 Mad 941; 25 M.L.J. 162; *Sheik Muhammad Ravuther v. British India Steam Navigation Co.*, (1908) I.L.R. 32 Mad. 95; 18 M.L.J. 497; *Hafee Ismail Sait v. Messageries Maritimes*, (1905) I.L.R. 28 Mad. 400; *Boggiano v. Arab Steamers*, (1915) I.L.R. 40 Bom. 529; 18 Bom. L.R. 126.

10. Carriers Act, 1830; Merchant Shipping Act, 1894, S. 502; Carriage of Goods by Sea Act, 1924; Carriage by Air Act, 1932; above, Chap. II, para. 11. For a case under this Act, see *Phillipson v. Imperial Airways Ltd.*, (1939) A.C. 332. As to limitation for liability under the M. S. Act, for personal injuries, above, Chap. II, para. 12.

11. Carriers Act, III of 1865; Indian Railways Act, 1890, S. 72 (1); Carriage by Sea Act, XXVI of 1925; Carriage by Air Act, XX of 1934; above, Chap. II, para. 11.

12. For an illustration, see *Northumberland Shipping Co., Ltd. v. Timm & Son Ltd.*, (1939) A.C. 397.

13. See *River Steam Navigation Co., Ltd. v. Jamunadas ref.*, (1931) I.L.R. 59 Cal. 472; 36 C.W.N. 129; 1932 Cal. 344 (contract exonerating carrier from liability for his servants' negligence void under Carriers Act).

12. **Innkeepers.**—An inn includes a hotel, tavern or public house where guests are received,¹ but not a coffee house, boarding house, a refreshment bar, lodging house, nor a place where selected persons are entertained for a short season during the year.² Like the common carrier, an innkeeper is bound, in the first place, to receive a guest and his luggage,³ and secondly, to answer for loss or damage to the goods of the guest except when it is due to an act of God, the Klug's enemies or the plaintiff's own fault.⁴ The leading authority on the subject is an early case of the sixteenth century known as *Oalyo's case*.⁵ There it was held that an innkeeper was liable, first, only if the plaintiff was a traveller, not a neighbour or friend who put his goods in the inn with the innkeeper's leave. If he is not accepted as a guest the innkeeper is not liable.⁶ Secondly, the goods must be inside the inn. Therefore in the above case the innkeeper was held not liable for the theft of a horse which the guest had asked him to put out to pasture.⁷ Thirdly, the absolute liability is only in respect of the safety of the guest's goods and not his person, as where he is assaulted by others in the inn. In respect of any injury due to defects in the premises, he is liable only like any other occupier for want of reasonable care.⁸ The ancient rule of absolute liability has been modified in England by the Innkeepers' Liability Act, 1863,⁹ which makes an innkeeper liable only for a wilful act, default or neglect in cases of loss of goods worth more than £ 30 and entrusted to him for safe custody.

13. **Liability of innkeepers in India.**—In India since the passing of the Contract Act, the liability of an innkeeper would be that of a bailee for negligence.¹⁰

1. Innkeepers' Liability Act, 1863 (26 & 27 Vict., c. 41), S. 4; Bas. Abr. "Inns and Innkeepers (B)".

2. Beven, Vol. II, p. 1034; see also *Scarborough v. Cosgrove*, (1905) 2 K.B. 895, 813; *Sealey v. Tandy*, (1902) 1 K.B. 296; *Caldecott v. Piesse*, (1934) 174 L.T. 362.

3. *Gordon v. Silber*, (1890) 25 Q.B. 491; *Browne v. Brandt*, (1902) 1 K.B. 696 (want of room); *Lamand v. Richard*, (1897) 1 Q.B. 541.

4. *Shacklock v. Ethorpe Ltd.*, (1939) 3 A.E.R. 372 (H.L.), where speaking of the last mentioned defence Lord Macmillan said (p. 374) "It is technically inaccurate to speak of the guest's contributory negligence". See also *Burgess v. Clements*, (1815) 4 M. & S. 306; *Mogan v. Ravey*, (1861) 6 H. & N. 265; *Carpenter v. Haymarket Hotel*, (1931) 1 K.B. 364. 5. (1584) 8 Co. Rep. 32-b; 1 Sm. L. C. 120.

6. *Strauss v. County Hotel*, (1883) 12 Q.B.D. 27; *Medumar v. Grand Hotel*, (1891) 2 Q.B. 11; *Jenkyns v. Southampton Steam Packet Co.*, (1919) 2 K.B. 135.

7. *Cf. Jones v. Tyler*, (1834) 1 A. & E. 522 (liable for loss of a gig left in the street); *Arls v. Bridge House Hotel*, (1927) 137 L.T. 299 (liable for loss of a car parked in space outside hotel).

8. *Muelenan v. Segar*, (1917) 2 K.B. 325; *Sandys v. Florence*, (1878) 47 L.J.C.P. 598; *Winkworth v. Raven*, (1931) 1 K.B. 652 (motor car damaged by frost due to open garage, innkeeper not liable).

9. 26 and 27 Vict., c. 14; see *Shacklock v. Ethorpe, Ltd.*, (1937) 4 A.E.R. 672.

10. See *Whateley v. Palenji*, (1866) 3 Bom. H.C.R. (O.C.) 137, a case before the Act, where the English common law rule was applied; the parties were a European guest and a Parsi hotel keeper in the Bombay City.

14. **Theory that liability under early English law was absolute.**—It is the opinion of eminent historians in England and the United States that liability in early English law was absolute and 'a man acted at his peril.' This theory was put forward by Maitland and Wigmore and has been adopted by Sir William Holdsworth. According to Wigmore, this was the feature of English law till the sixteenth century when it began to entertain the modern standard of moral blame or fault.¹ Similarly Ames observed that "the ethical standard of reasonable conduct has replaced the unmoral standard of acting at one's peril."² Dr. Winfield has however questioned the soundness of these views in an article in the *Law Quarterly Review* under the caption "The Myth of Absolute Liability."³ The theory of absolute liability rests on certain facts of English legal history which are beyond contest, but it is also necessary to understand it with certain reservations. These facts are, first, that till about the thirteenth century when the King's courts had begun to function, the law was dominated by instincts of vengeance and superstition, and judicial procedure in its modern form for determining legal responsibility had not emerged⁴; and second, that during the succeeding five centuries principles of liability were obscured by the technicalities of forms of action.⁵ It was only during the last century that courts formally adopted modern tests, *viz.*, that negligence means absence of care of a reasonable person, and there can be no liability for damage not avoidable by such care. But one may perhaps venture to doubt with Dr. Winfield whether the older law really operated with any such severity as is suggested by the broad statement that a person acted at his peril.⁶ For instance, mediaeval authorities spoke of liability in trespass as absolute in the sense that it would not admit of any defence like misadventure or accident.⁷ But there is no clear evidence that actions of trespass were allowed in cases where the facts would, according to modern standards, not involve liability for negligence. The requirement that the damage must be direct was, as we have already seen,⁸ capable of being so understood as to let in questions of culpability or otherwise. Besides, it must be remembered that in older times cases of accident would have been comparatively rare. Courts were then mainly concerned with acts of intentional violence, and were content with a few simple rules regulating conduct which was then usually attended with risk. For instance, a law of Alfred⁹ prescribed the mode of carrying a spear on one's shoulder to avoid another being staked on it. It laid down that there would be liability for injury if the point was three fingers higher than the hindmost part of the shaft. In a later age, courts had rules about the liability for fire starting from a house and for the escape of cattle and dangerous animals. It is in the last century when litigation relating to unintended injuries assumed great proportions owing to mechanical inventions and the conditions of modern life, that courts evolved a general rule of liability for absence of due care in the circumstances.

1. Anglo-American Essays on Legal History, Vol. III, at p. 506; see also P. and M., Vol. II, p. 470; Holdsworth, Vol. II, p. 51; Vol. III, pp. 375 to 388; Vol. VIII, pp. 446-459.

2. Selected Essays on Torts, p. 3.

3. 42 L.Q.R. 37. See also Holmes, Common Law, pp. 80-89. His theory was that liability was originally based on personal fault and came later to be determined by external standards irrespective of fault.

4. Above, Chap. I, paras. 5 to 8; Chap. XIV, para. 101.

5. Above, Chap. II, para. 3; above, note 4.

6. See for instance the reference by Wigmore in A. A. L. H., p. 488 to the *Leges Henrici* which prescribed a nominal fine in cases of accident.

7. These terms did not mean what they do now. "The misadventure of this age covers many a blameworthy act"; P. & M., Vol. II, p. 483.

8. Above, Chap. XIV, para. 101.

9. Holdsworth, Vol. II, p. 51; Holmes, Common Law, p. 113.

CHAPTER XVI.

VICARIOUS LIABILITY.

1. **Vicarious liability.**—The liability of a person for a tort committed by another arises under the common law in two ways : (a) authority to commit it, and (b) relationship of master and servant. There was a third instance of such liability, *viz.*, relationship of husband and wife. Under the common law a husband was liable for his wife's tort. This rule prevailed for centuries and met its deserved end in 1935 when it was abolished by the Law Reform (Married Women and Tortfeasors) Act,¹ one of the reforms recommended by the Law Revision Committee in England.² Vicarious liability may also arise under statute,³ *e.g.*, the liability of employers under the Workmen's Compensation Act,⁴ of the owner of aircraft under the Air Navigation Acts.⁵ The two common law modes of liability may now be considered.

2. **Authority to commit a tort.**—A person may become liable by authorising or procuring another to commit a tort. In such a case he is also a joint wrongdoer with the latter⁶ and liable for the tort actually authorised as well as its direct consequences. In *Gregory v. Piper*,⁷ the defendant employed a labourer to heap up rubbish so as to obstruct a right of way claimed by another person but in such a manner as not to touch that person's wall. But the rubbish being loose shingled down against the wall. The defendant was held liable in trespass. The authority may be previous or subsequent. In the latter case, it is necessary in order to hold a person liable by ratification of another's act that the latter should have purported to do it on behalf of the former and that the former had full knowledge of the nature of the act that he ratified.⁸

3. **Master and servant.**—The liability of a master for torts committed by his servant without his authority has assumed great proportions in the modern law. The rule is usually stated thus : a master is liable for

1. 25 & 26 Geo. 5, c. 30, s. 3; *Barber v. Pigden*, (1937) 1 K.B. 664. For a decision under the older law, see *Edwards v. Porter*, (1925) A.C. 1.

2. For two other reforms recommended by the committee and carried out by statute, see below, Chap. XIX, paras. 29 and 31.

3. In the U.S.A. there are statutes which provide for communal liability for 'lynching' and other forms of mob violence; 49 Har. L.R. 1362. Cf. the rules of international law which make States liable for damage caused by their subjects to foreigners.

4. Above, Chap. II, para. 8.

5. Above, Chap. II, para. 10.

6. Below, Chap. XIX, para. 25.

7. (1829) 9 B. & C. 591.

8. *Eastern Construction Co. v. National Trust Co.*, (1914) A. C. 197 at p. 213; *Marsh v. Joseph*, (1897) 1 Ch. 213; *Wilson v. Tunman*, (1843) 6 M. & G. 236; *Venkatasa v. Srinivasachari*, (1869) 4 M. H. C. R. 410; *Rani Shama Sundari v. Dukhu*, (1869) 2 B.L.R. (A.C.J.) 227, 229.

a tort committed by his servant in the course of the latter's employment.¹ It involves two points, first, that the relationship of master and servant exists between them, and second, a tort is committed by the servant in the course of his employment.

4. **Relationship of master and servant.**—The test of such relationship is whether the master has the control or the right to control the servant in the manner of doing the work.² This test is satisfied in many usual employments like an owner of a car employing a driver and also in cases like principal and agent, a trading firm and its partners, one partner and another. A corporation is in relation to its servant his master though the control can be exercised only through its other servants or agents.³ The liability of various corporations, trading and non-trading, private and public, occupies a large part of the case-law on employers' liability in modern times. If the above test is satisfied, it is unnecessary that the servant is paid or is a servant in the usual or popular sense. If A asks or allows his friend, B, to drive A's car, A is the master of B in that regard, because A has the right to see that B drives properly and to stop his driving if he is dissatisfied with it.⁴ If the above test is not satisfied, a person is not the master of another though he employs or pays the latter. Thus a person who employed a commercial traveller to take samples of his goods for sale in a car owned and driven by the latter and made a payment also towards the cost of petrol was not liable as a master for injury due to the latter's negligence in driving.⁵ When the defendant had given her car to her son to use and the latter caused injury by his negligent driving, he could not be regarded as her servant or agent.⁶ In a Bombay case,⁷ it was held that a mortgagee of a motor car was not liable for a fatal accident due to the negligence of the mortgagor who remained in possession of the car and plied it for hire. The control may be absent temporarily or in respect

1. *Laugher v. Pointer*, (1826) 5 B. & C. 547, 554; *Barwick v. English Joint Stock Bank*, (1867) L. R. 2 Ex. 259, 265.

2. *Donovan v. Laing Construction Syndicate*, (1893) 1 Q. B. 629, per Bowen, L.J.; *Performing Right Society v. Mitchell*, (1924) 1 K. B. 762.

3. *Mersey Docks and Harbour Board v. Gibbs*, (1865) L. R. 1 H. L. 93. The liability would depend on the relevant statute. For instances of local authorities held not liable by reason of statutory provisions, see *Fisher v. Oldham Corporation*, (1930) 2 K. B. 364 (borough corporation not liable for wrongful arrest by a police officer employed by it); *Toseland v. West Ham Union*, (1907) 1 K. B. 920 (Poor law guardians not liable for negligence of their officer in discharge of administrative duties); *Bulhasar v. Rangoon Municipality*, 1935 Rang. 439 (city corporation not liable for acts of a Revenue officer).

4. *Pratt v. Patrick*, (1924) 1 K.B. 488; *Parker v. Miller*, (1926) 42 T.L.R. 408; *Brooke v. Bool*, (1928) 2 K.B. 578; *Samson v. Aitchison*, (1912) A.C. 844; *Wheally v. Patrick*, (1837) 2 M. & W. 650.

5. *Eggington v. Reader*, (1936) 1 A.E.R. 7.

6. *Daniels v. Vaux*, (1938) 2 A.E.R. 271; *Hewitt v. Bonwin*, (1939) 161 L.T. 360 C.A.

7. *Goolbai v. Pestonji*, 1935 Bom. 333 : 37 Bom. L.R. 410.

of a particular work. When a person lent his car to his servant to take the latter's friend to a theatre, he was held not liable for an injury which occurred during the servant's use of the car.¹ The above test has to be applied also to find out which of two persons is the master in a particular case. If *A* has the loan of *B*'s driver to drive *A*'s car or *A*'s horses for a journey, *A* is the master of the driver during that journey and not *B* who pays the driver's wages.² But if *A* hires of *B*, a livery stable keeper, a carriage, horses and driver, or horses and driver alone to drive his own carriage, then *B* and not *A* is the master as the right to control is presumed to be in the owner of the horses. This was decided long ago in two well-known cases, *Laugher v. Pointer*³ and *Quarman v. Burnett*,⁴ where the owner of a carriage who hired horses and driver of a stable keeper was held not liable for the negligence of the driver. On the other hand in *Jones v. Scullard*,⁵ an owner of a carriage, horses and harness who hired a driver of a livery stable keeper was held liable for the driver's negligence. In cases where a person lets out a cab to another who pays the former a fixed amount out of his earnings, the relationship is *prima facie* that of bailor and bailee and not of master and servant. But in England, by statute,⁶ the registered owner is placed in the position of a master of the hirer or driver. In cases of this kind where there are apparently two masters, it is a question of fact in each case as to who exercises the control or has the right to do so.⁷ A nursing association who supplied nurses on payment was held not liable for the negligence of a nurse while on attendance on a patient.⁸ Sometimes the facts may be complicated and the test of control may require further elucidation. In *Century Insurance Co. v. N. I. Road Transport Board*⁹, the Transport Board who were owners of lorries or petrol tankers had agreed with a certain firm of petrol suppliers to deliver through their lorries petrol from the suppliers to the suppliers' customers. Among other terms of the contract between them was a provi-

1. *Britt v. Galmey*, (1928) 44 T.L.R. 294.

2. *Donovan v. Lsing Construction Syndicate*, (1893) 1 Q.B. 629 C.A.; *Perkins v. Stead*, (1907) 23 T.L.R. 433. 3. (1826) 5 B. & C. 547.

4. (1840) 6 M. & W. 499; this is so even if he habitually engaged the same driver; *Dewar v. Tasker*, (1907) 23 T.L.R. 259; *Jones v. Liverpool Corporation*, (1885) 14 Q.B.D. 890; *Waldock v. Winfield*, (1901) 2 K.B. 596; *I.B.S. Navigation Co. v. B.I.S.N. Navigation Co.*, 1934 Rang. 185 (hirer of ship not master of serang).

5. (1898) 2 Q.B. 565.

6. In London by the London Hackney Carriage Act, 1843 (6 & 7 Vict., c. 86); outside London by the Town Police Clauses Act, 1847 (10 & 11 Vict., c. 89); *Bygraves v. Dicker*, (1923) 2 K. B. 585; see also *Bombay Tramway Co. v. Khairaj*, (1883) 1 L. R. 7 Bom. 119.

7. See above, note 2; see also *Bain v. Central Vermont Ry. Co.*, (1921) 2 A.C. 412; *Bull & Co. v. West African Shipping Co.*, (1927) A.C. 686; *Murray v. Currie*, (1870) L. R. 6 C.P. 24; *Clelland v. Edward Lloyd, Ltd.*, (1938) 1 K. B. 172; *Willard v. Whiteley Ltd.*, (1938) 3 A.E.R. 779 C.A.; *Abdul v. Pauling*, (1916) 19 Bom. L. R. 167; 38 I. C. 773; *Kondwa v. Miskrifjan*, (1927) 30 Bom. L. R. 162; 1928 Bom. 91.

8. *Hall v. Lees*, (1904) 2 K.B. 602.

9. (1942) A.C. 509.

sion that all the employees of the lorry owners engaged in or about such delivery should accept and obey the orders of the suppliers regarding such delivery, the payments of accounts and all matters incidental thereto and the owners should dismiss any employee disregarding or failing to obey such orders. There followed a proviso that nothing contained in this clause should be taken as implying that such employees were in any way the employees of the suppliers. A driver employed by the lorry-owners to drive the tanker negligently lighted a cigarette and threw the lighted match on the floor while his tanker was discharging petrol through its pipe to a garage of a customer of the suppliers and injury to property resulted. It was held that the driver was and continued to be the servant of the owners and not of the suppliers and that the owners would therefore be liable for his negligence. On the facts of this case the test of control is not quite simple or easy to apply without further explanation and Lord Simon, L.C. and Lord Wright adopted a test used by Lord Bowen in an earlier case,¹ viz., "Whether the servant was transferred or only the use and benefit of his work".

4-A. Liabilities of Hospital Authorities.—In *Hillyer v. Governors of St. Bartholomew Hospital*,² the Court of Appeal held that a hospital authority was not liable for injury to a patient due to the negligence of the surgeon and nurses in the course of an operation in the operating theatre. The decision could be rested on the narrow ground that on the facts of that case the plaintiff had not made out the negligence of any particular member of the staff of the hospital. But certain dicta in the judgments lent support to the view (a) that a hospital authority is not for the present purpose a master of the surgeon or nurse helping the surgeon under his orders, because it had no right to direct or control the doctors, nurses or other persons employed for skilled services in the manner of doing their work; (b) that the governors of a hospital admit a patient into it only on the terms that they are responsible for the employment of a competent staff of doctors and nurses but not for want of care or skill in the performance of the latter's professional duties. These views influenced later decisions³ in England but must now be regarded in view of the more recent ones as no longer authoritative. In *Lindsey County Council v. Marshall*,⁴ the House of Lords refrained from expressing an opinion on these cases and reserved

1. *Moore v. Palmer*, (1886) 2 T. L. R. 781.

2. (1909) 2 K. B. 820; as to a solicitor employed by a client, see *Jarmain v. Hooper*, (1843) 6 M. & G. 827; *Smith v. Keul*, (1882) 9 Q. B. D. 340; *Hewitt v. Spiers*, (1896) 13 T. L. R. 64; see also *University of London Press v. University Tutorial Press*, (1916) 2 Ch. at p. 611.

3. *Brütt v. Galmoye*, (1928) 44 T. L. R. 294; *Strangeways-Lesmere v. Clayton*, (1936) 2 K.B. 11; *Dryden v. Surrey, C.C.*, (1936) 2 A.E.R. 536. See also *Evans v. Liverpool Corporation*, (1906) 1 K. B. 160. A surgeon is not liable for the faults of the attendant staff; *Morris v. Winsbury-White*, (1937) 4 A. E. R. 494.

4. (1937) A.C. 97. The decision was also rested on the invitor's liability for safety of the premises.

it till the question came up for review directly, but held that the managers of a hospital or a nursing home would be liable for want of care on the part of a doctor or nurse in performing administrative or ministerial functions. Therefore an action was allowed against a local authority for harm suffered by a patient on account of the negligence of its doctors in admitting her into a maternity home in which another patient had suffered some days before from a contagious disease, *viz*, puerperal fever. In *Gold v. Essex County Council*¹, the decision in *Hillyers'* case was subjected to a close analysis and criticism by the Court of Appeal and it was held that a hospital authority was liable for the negligence of a radiographer employed by it in its X-ray department who caused injury to the infant plaintiff by his failure to provide adequate screening material in giving Grenzray treatment. The Court of Appeal refused to regard *Hillyers'* case as a binding or valid authority for anything more than that in that case the plaintiff did not make out negligence on the part of any particular person who took part in the work at the operating theatre. The decision in *Hillyers'* case was approved in so far as it laid down that a local authority which maintains a hospital and admits patients into it free of charge or otherwise is not responsible for the negligence of the visiting or consulting physicians or surgeons in doing their work. A distinction must be made between such people who are not under a contract of service and not therefore employees of the hospital authority and the house-surgeons, nurses and other regular members of the staff. For the negligence of these latter, a hospital authority would appear to be liable on the reasoning of the judgments in the more recent case. These judgments refuted the theory that there can be no liability for the negligence of a skilled servant like a surgeon or nurse² or that a nurse while under the orders of the surgeon in the course of an operation ceases to be the servant of the hospital authority. If of course a nurse merely carried out the orders of the doctor and was not guilty of any personal negligence, neither she nor her employer can be liable.

5. **Proof of relationship of master and servant.**—It is on the plaintiff to prove that the wrongdoer was the servant of the defendant. It may be presumed on particular facts. For instance it was held that where the defendant's car collided with the plaintiff's van and caused damage, mere proof of his ownership of the car supplied *prima facie* evidence of the fact that the driver was his servant and acted in the course of employment.³

1. (1942) 2 A.E.R. 237. See also 54 L.Q.R. 553. As regards government hospitals in India, see below, para. 29.

2. (1937) A.C. at p. 122, *per* Lord Wright. The reasoning in *Wilsons & Clyde Coal Co.'s* case, (1938) A.C. 57, below, para. 21, also seems to militate against the view in *Hillyers'* case.

3. *Barnard v. Sully*, (1931) 47 T.L.R. 557; *Liladhar v. Harilal*, I.L.R. (1937) Bom. 268; 1937 Bom. 155; *Bangalore Printing and Publishing Co., Ltd. v. M. K. Murty*, 45 Mys. H.C.R. 166; 18 Mys. L.J. 345.

6. **Independent contractor.**—It is necessary to distinguish between a servant and an independent contractor. The latter is one who undertakes to do a certain work or produce a certain result for another but in the actual execution is not under the latter's control,¹ e.g., a building contractor. An employer of an independent contractor is not therefore liable for the faults of the latter or his servants. The rule would not apply if the employer reserves for himself a right of control or actually exercises it.² To this rule there are the following exceptions : (a) The employer is liable if he employs a contractor to do an unlawful act. A gas company which proposed to break open a public street without lawful authority and employed a firm of contractors for the purpose was held liable for the latter's negligence in doing the work resulting in injury to a person walking in the street.³ (b) The employer is liable if the employment of a contractor is improper or negligent, e. g., where a person entrusts the work to an incompetent contractor. (c) When a person has under the common law or statute a duty which is personal to him, he cannot escape liability by delegating it to a contractor. Instances of such common law duties are the duty of an occupier of dangerous premises to a person on the highway,⁴ to an invitee,⁵ or to the adjoining occupier,⁶ that of an occupier of property to abstain from interfering with the support of adjoining land or premises,⁷ or from causing harm by bringing dangerous things like fire, explosives, wild animals on his land,⁸ that of a person who undertakes a dangerous work in a highway.⁹ To this list of duties two more must now be added. One of them is the duty of a person who undertakes a dangerous work in another's premises. This follows from the decision of the Court of Appeal in *Honeywill & Stein, Ltd. v. Larkin Bros.*¹⁰ The plaintiffs who were installing a sound-reproduction apparatus in a cinema theatre employed the defendants to take a flashlight photograph of the interior of the theatre. On account of the defendants' negligence there was a fire and the plaintiffs had to pay for the damage to the owners of the theatre. It was held that they could claim the amount they paid from the defendants. As the taking of a flashlight

1. *Quarman v. Burnett*, (1840) 6 M. & W. at p. 509.

2. *Performing Right Society v. Mitchell*, (1924) 1 K. B. 762; see also *Burgess v. Gray*, (1845) 1 C. B. 578; *Union Steamship Co. v. Claridge*, (1894) A. C. 185.

3. *Ellis v. Sheffield Gas Consumer's Co.*, (1852) 2 E. & B. 767.

4. Above, Chap. VI, para. 14; see also *Corporation of Calcutta v. Anderson*, (1884) I. L. R. 10 Cal. 445. 5. Above, Chap. XIV, para. 18.

6. Above, Chap. VI, para. 61.

7. Above, Chap. VI, para. 28.

8. Above, Chap. VI, paras. 64, 73; see also *Maung Pein v. Ma The Ngive*, (1925) I. L. R. 2 Rang. 549.

9. *Holliday v. National Telephone Co.*, (1899) 2 Q. B. 392.

10. (1934) 1 K. B. 191; see also *Matania v. Nat. Prov. Bank*, (1936) 2 A. E. R. 633; *S. S. Pass of Ballater*, (1942) P. 112; *Mt. Sultan Bi v. Nand Lal*, 1938 Nag. 296 (cutting a tree is not extra hazardous).

photograph involves a fire and explosion it was a dangerous work and the plaintiffs would be liable for the negligence of their contractors. The other is the duty of an employer to his workman to take due care to provide competent fellow-servants, proper machinery and system of work. This is the result of the decision of the House of Lords in *Wilsons & Clyde Coal Co. v. English*,¹ to be mentioned later. The duty may be also under statute, e.g., the duty under the Factories Acts to fence dangerous machinery in a factory,² or under a Municipal Act to use care to light or fence gravel stacked for repair of a highway.³ The tendency of Courts and Parliament is to extend the sphere of these special duties and thereby the responsibility of employers for the torts of contractors.⁴ The employer will, of course, not be liable for his contractor's 'collateral' or 'casual' negligence, that is, negligence which is not necessarily connected with the work entrusted to the latter; for instance, he would not be liable if a contractor employed by him to repair a house lets fall a tool on a person on an adjoining highway.⁵

6-A. Absence of relationship of master and servant.—The relationship is absent in the following cases:—

(i) *Employer and independent contractor.*—This has been considered already.

(ii) *Employer and servant of a contractor.*—The employer of an independent contractor is not liable for the wrong of a servant who works under the control of the latter. This would be the case even where the employer lends his servant to the latter.⁶

(iii) *Employer and delegate of a servant.*—An employer is not liable for the wrong of a person to whom his servant delegates his work without his knowledge or authority.⁷

(iv) *Employer and servant whom he is compelled to employ.*—An employer is not liable for the wrong of a servant whom he is compelled to employ e.g., a compulsory pilot.⁸

1. (1938) A. C. 57; below, para. 21.

2. *Groves v. Wimborne*, (1898) 2 Q. B. 402; below, Chap. XVII, paras. 2 and 4.

3. *Vinagapatam Municipal Council v. Foster*, (1917) 1 L. R. 41 Mad. 538.

4. *Honeywill & Stein, Ltd. v. Larkin Bros.*, (1934) 1 K. B. at p. 197, *per* Slesser, L. J. See above, Chap. XV, para. 4.

5. Above, Chap. VI, p. 165, and cases in notes 6 and 7 therein; *Penny v. Wimbledon U. D. C.*, (1899) 2 Q. B. 72, 78; Salmond, Torts, pp. 121, 122; Restatement, § 426.

6. *Rourke v. White Moss Colliery Co.*, (1877) 2 C.P.D. 205; as to a case of an employer taking a loan of the contractor's servants, see *Jones v. Corporation of Liverpool*, (1885) 14 Q. B.D. 890; *Societe Maritime Francaise v. Shanghai Dock etc., Co.*, (1921) 2 A.C. 417 n; 125 L.T. 134; see also *Waldock v. Winfield*, (1901) 2 K.B. 596; *Johnson v. Lindsay*, (1891) A.C. 371.

7. *Gwilliam v. Twist*, (1895) 2 Q.B. 84; *Houghton v. Pilkington*, (1913) 3 K.B. 308.

8. *The Halley*, (1868) L.R. 2 P.C. at p. 201. The owner and master are now liable; Pilotage Act, 1913 (2 & 3 Geo. 5, c. 31), s. 15.

(v) *Fellow-servant*.—A superior servant cannot be sued for the wrong done by an inferior servant without the former's authority. It is their ultimate employer who is liable.¹ It is on this principle that officers of the Crown are held not liable for the faults of their subordinates. The Postmaster-General was held not liable for a theft of parcels by some of his servants.² As the Crown is exempt from suit,³ the result is that in cases of torts by servants of the Crown an action lies only against the actual tortfeasor but not his employers. Similarly, the directors of a company cannot be sued for the acts of their servants⁴; it is the company that is liable.

(vi) *Domestic relations*.—A father is not the master of his child, nor a guardian of his ward, unless the child or ward acts *de facto* as servant.⁵

7. **Tort committed by a servant in the course of his employment.**—The liability of a master for his servant's tort is usually referred to but not explained by the phrase *respondeat superior*, let the principal or master be liable. Nor does the maxim, *qui facit per alium facit per se*, he who acts through another is liable as if he acted himself, furnish the reason of the rule of liability in tort. The maxim is usually cited in the law of agency, and is in that context an application of the rule of estoppel which prevents the principal from challenging the validity of contracts or other acts of his agent within the scope of his authority. The liability of an employer for an unauthorised wrong of his servant rests on a different foundation and is a rule of convenience and expediency. The test of liability is whether the wrong committed by the servant is of the class of acts which are expressly authorised by the employer or is incidental to such acts, or in other words, whether the wrong is an improper mode of doing an act which is authorised or is incidental to such an act. To take a simple illustration, A is liable if his driver B drove his car rashly and caused injury to another, but not if C, A's clerk took the car out without A's or B's knowledge and caused injury by rash driving. This is because A had authorised B but not C to drive the car. In *Beard v London*

1. *Stone v. Cartwright*, (1795) 6 T.R. 411.

2. *Lane v. Cotton*, (1701) 1 Ld. Raym. 646; see also *Bainbridge v. P. M. G.*, (1906) 1 K.B. 178; *Kynaston v. A. G.*, (1933) 49 T.L.R. 300. The same rule applies though a superior department of state is incorporated by statute; *Roper v. Public Works Commissioners*, (1915) 1 K.B. 45; *Mackenzie-Kennedy v. Air Council*, (1927) 2 K.B. 517. For a statutory exception, see the Ministry of Transport Act, 1919, 9 & 10 Geo. 5, c. 50, s. 26 (1) making the Minister liable for the acts and defaults of his subordinates. For a criticism of the rule, see Holdsworth, Vol. IX, 44; X, 655.

3. Below, para. 27 and Chap. XIX, para. 16.

4. *Weir v. Barnett*, (1877) 3 Ex. D. 32; *Weir v. Bell*, (1878) 3 Ex. D. 238. Nor can they be sued for a wrong committed by the company; *British Thomson-Houston Co. v. Sterling Accessories, Ltd.*, (1924) 2 Ch. 33.

5. *Luchmun v. Narayan*, (1871) 3 N.W.P. 191.

General Omnibus Co.,¹ the owner of a bus was held not liable when the conductor in the absence of the driver drove it through some by-streets for turning it round for the return journey and in so doing injured the plaintiff. Till the middle of the last century, the usual instances of employers' liability which came before the courts were those of negligent performance of the servant's work, *e.g.*, bad driving. The liability for servants' trespasses was not recognised except when they were authorised or were the necessary consequences of the authorised act as in *Gregory v. Piper*.² But since then, it has received considerable extension, and employers have been held liable not merely for the mistakes or carelessness of their servants but for their trespasses to person or property, wilful, malicious, fraudulent or even criminal acts, acts done against the express orders or instructions of the master and for the servant's own and not for the master's benefit. The essential condition is, as above stated, that such acts can be regarded as improper modes of performing the authorised acts. Some of these categories of servants' wrongs may be considered.

8. **Conduct forbidden by the employer.**—In *Limpus v. London General Omnibus Co.*,³ an omnibus company was held liable when its driver raced with another bus and drove so rashly as to overturn it, notwithstanding the fact that he had been given express instructions by the company not to race with or obstruct other vehicles on the road. The reason was said to be that the driver was employed not only to drive but to get as much money as he could for his employers, if necessary, by outdoing their rivals and impressing the passengers favourably, and that an employer cannot escape liability on the ground of his having prohibited the wrong done by his servant or agent.⁴ Similarly, a person was held liable when his servant had, in spite of his orders to the contrary, left a carriage and horse unattended in front of his own house into which he had gone during the dinner-interval.⁵ In *Canadian Pacific Railway Co. v. Lockart* ⁶, the Privy Council held that the applicant company was liable when its servant used his car in disregard of the written notices prohibiting employees from using privately owned motor-cars for the purpose of its business unless adequately protected by insurance. The servant was employed to do work as a carpenter and general handy-man and for that purpose he

1. (1900) 2 Q.B. 530; if the driver allowed the conductor to drive, the master would be liable for the driver's breach of duty, *Ricketts v. Thos. Tilling*, (1915) 1 K.B. 644; see also *Nalini Ranjan v Corporation of Calcutta*, (1925) I.L.R. 52 Cal. 983; 29 C.W.N. 815 (master held not liable when cleaner with whom the driver left the car drove it).

2. (1829) 9 B. & C. 591; above, para. 2.

3. (1862) 1 H. & C. 526; see also *Craft v. Alison*, (1821) 4 B. & Ald. 590.

4. *Cf.* a similar rule in the law of agency; *Edmunds v. Bushell*, (1865) L.R. 1 Q.B. 97, 99.

5. *Whatman v. Pearson*, (1868) L.R. 3 C.P. 422; see also *Engelhart v. Farrant*, (1897) 1 Q.B. 240.

6. (1942) A.C. 591.

required to go from one part of the company's premises to another. The means of transport used by him for doing so was incidental to the performance of his authorised work and the fact that he did it in an unauthorised or prohibited mode would not take away the employer's liability to a third party. If, for instance, the employer had forbidden him to drive his own motor car in the course of doing the master's work, it might well have been maintained that he was employed to do carpentry work and not to drive a motor car, but it was not driving his car that was prohibited but the use of a non-insured car for performing the employer's work. This case illustrates the care required and the difficulty sometimes involved in the application of the test of liability to actual facts. It is hardly necessary to add that a master is liable when his servant performs the authorised act in a mode which is merely unauthorised but not prohibited or forbidden. Where a workman who was asked by the employers to take over one of their lorries and give a message to a convoy which was coming by road took his father's car instead of the employers' lorry and negligently ran over and killed a person on the road, the latter's widow was held entitled to recover damages from the employers. The workman's use of his own car instead of his employers' did not make the journey an unauthorised journey but he did it only in an unauthorised way.¹

9. **Fraud.**—In the leading case of *Barwick v. English Joint Stock Bank*,² a bank was held liable for the fraud of its manager. Willes, J., made the well-known observation :

"With respect to the question, whether a principal is answerable for the act of his agent in the course of his master's business and for his master's benefit, no sensible distinction can be drawn between the case of fraud and the case of any other wrong."

In that case, the bank manager made a fraudulent representation to the plaintiff who on the strength of it supplied goods on credit to a customer of the bank and suffered loss ; and in doing so the manager acted in the bank's interest and for realising the bank's dues from that customer. The phrase "for the master's benefit" was therefore appropriate to the facts of that case, but was understood in later cases to imply that the master would not be liable if the wrong was committed not for his but for the servant's own benefit. This view was corrected by the House of Lords in *Lloyd v. Grace, Smith & Co.*,³ where the defendants, a firm of solicitors, were held liable for a fraud committed by their manager for his own benefit on a client of the firm.

1. *McKean v. Raynor Bros. Ltd.*, (1942) 2 A.E.R. 650.

2. (1867) L.R. 2 Ex. 259. The employer's liability for fraud or deceit was recognised long ago ; *Hern v. Nichols*, (1700) 1 Salk. 289 ; *Armory v. Delamirie*, (1721) 1 Stra. 505 ; Sm. L.C., Vol. 1, 393 ; above, Chap. V, paras. 26 and 60 ; doubt was created by *Udell v. Atherton*, (1861) 7 H. & N. 172.

3. (1912) A.C. 716 ; *Uxbridge Bridge Society v. Pickard*, (1939) 2 K.B. 248 C.A. *Dinabandu v. Abdul Latif*, (1922) 1 L.R. 50 Cal. 258 : 27 C.W.N. 18.

10. **Wilful injury to person.**—In *Seymour v. Greenwood*,¹ a person was held liable for assault and bodily harm caused wilfully by his servant, the conductor of an omnibus, who violently threw out a passenger whom he considered drunk and offensive. It was part of his duty to keep out passengers of that kind and his conduct amounted only to an excessive or improper performance of it. In *Bayley v. Manchester, Sheffield and Lincolnshire Ry. Co.*,² a railway company was held liable when a porter in their employ violently pulled out a passenger from a train which was about to start, under a misapprehension that he was in the wrong train. In *Poland v. Parr & Sons*,³ a carter in the defendant's employment was following close behind a waggon laden with bags of sugar and driven by one of his employers. He saw a boy walking beside the waggon with his hand upon one of the bags and gave the boy a blow on the back of the neck, with the result that the boy fell down and his foot was injured by the wheel of the waggon. It was held that as the carter suspected the boy of stealing the sugar, he had implied authority to make reasonable efforts to protect and preserve his master's property and his act was only a mistaken and excessive performance of his duties. The employers were therefore held liable. On the other hand, a water company was held not liable for assault committed by their agent when executing a distraint warrant for recovering their water-rate.⁴ An assault, and much less, violence like shooting⁵ are not reasonably incidental to an authority to distrain. But when the defendant, a furniture dealer, sent his manager to retake an article of furniture from a customer who had hired it under the hire-purchase system and had defaulted in the payment of an instalment, he was held liable for an assault committed by his manager on the landlady of the house in which the hirer was lodging, by forcibly removing her from the furniture.⁶ The manager's authority involved the power to remove any obstruction in the way of retaking the article. Employers have been held liable for an illegal arrest or imprisonment by their servants.⁷ In *Goff v. Great Northern Ry.*,⁸ a railway company was held liable for an

1. (1861) 7 H. & N. 355; for similar cases see *Lowe v. G. N. Ry. Co.*, (1893) 62 L.J.Q.B. 524; *Hutchins v. London County Council*, (1916) 32 T.L.R. 179; *Smith v. North Metropolitan Tramways Co.*, (1891) 55 J.P. 630; *Whittaker v. London County Council*, (1915) 2 K.B. 676. 2. (1872) L.R. 7 C.P. 415; 8 C.P. 148. 3. (1927) 1 K.B. 236.

4. *Richards v. West Middlesex Waterworks Co.*, (1884) 15 Q.B.D. 660; see also *Radley v. L. C. C.*, (1913) 109 L.T. 16.

5. *Kinsella v. Hamilton*, (1890) 26 L.R. Ir. 671.

6. *Dyer v. Munday*, (1895) 1 Q.B. 742.

7. As to the liability of the Government for an arrest by a police officer, see below, para. 29.

8. (1861) 3 E. & E. 672; for other cases, see *Moore v. Metropolitan Ry. Co.*, (1872) L. R. 8. Q.B. 36; *Kirkstall Brewery Co. v. Furness Ry. Co.*, (1874) L.R. 9 Q.B. 468; *Van Den Eynde v. Ulster Ry. Co.*, (1870) 5 Ir. R.C.L. 328; *Percy v. Corporation of Glasgow*, (1922) 2 A.C. 299.

arrest of a passenger by a railway servant for non-payment of his fare. On the other hand, in *Poulton v. London and South Western Ry. Co.*,¹ the defendants, a railway company, were held not liable when a station-master detained the plaintiff, a passenger, on an unfounded suspicion that he took his horses in a train without paying for them, as the Railway Act then in force gave power to railway servants to detain a passenger only if he failed to pay his own fare but not that for his goods.² In other words, the station-master had, under the circumstances wrongly supposed by him to exist, no authority to arrest. The Railway Acts now in force in England and in India define with precision the powers of arrest by railway officers and the circumstances and the manner in which it can be made. A railway company can be held liable only for an excessive or mistaken exercise of such powers but not for an unauthorised assumption of powers which do not exist. Thus in the case of a person travelling without a ticket or with a lower class ticket in a higher class compartment, the power to arrest arises only if he refuses to give his name and address or gives a name and address which appear to be false.³ Therefore a passenger who was wrongfully detained on suspicion that he travelled in a first class compartment with a lower class ticket could not sue the railway company.⁴ In a Bombay case,⁵ a suit against a railway company by a person who was assaulted and detained by a railway guard on suspicion of his having improperly pulled the communication chain was dismissed as the guard had no authority to act in the manner he did, even if the facts supposed were true. On the other hand, a railway company was held liable when a railway constable arrested a person on suspicion of felony without reasonable cause.⁶ A bank was held not liable when its manager gave into police custody a well-known trader of the same place whom he suspected of fraud in connection with a bill of exchange.⁷ It would be otherwise if an arrest by a servant can be reasonably considered

1. (1867) L.R. 2 Q.B. 534.

2. There was a dictum of Blackburn, J., in this case that the company could not be liable for an arrest which was not within its corporate powers. This is material for the present purpose only to show that the company could not have authorised its servants to make the arrest; below, para. 14.

3. Indian Railways Act, 1890, s. 132.

4. *Ormiston v. G. W. Ry.*, (1917) 1 K.B. 598.

5. *Girjashankar v. B. B. & C. I. Ry. Co.*, (1917) I.L.R. 43 Bom. 103; 20 Bom. L. R. 126. 6. *Lambert v. G. E. Ry. Co.*, (1909) 2 K. B. 776.

7. *Bank of N. S. Wales v. Owston*, (1879) 4 A. C. 270; see also *Abrahams v. Deakin*, (1891) 1 Q. B. 516 (manager of public house had no authority to give a person into custody on a charge of attempting to pass bad money); *Knight v. N.M. Tramways Co.*, (1898) 78 L.T. 227 (similar case); *Stevens v. Hinshelwood*, (1891) 55 J.P. 341 (a carrier's servants giving the servant of a rival carrier into custody on a charge of loitering with intent to commit a felony).

necessary on an occasion of emergency to secure the master's property¹. In *Ryan v. Fildes*² the managers of a school were held liable to pay damages for injury caused by a school mistress giving a box on the ear of one of the pupils causing him deafness. The managers were, however, entitled to indemnity by way of contribution under the Law Reform (Married Women and Tortfeasors) Act, 1935.

11. Wilful injury to property and reputation.—Employers have been held liable for trespass to immovable property,³ conversion⁴ or theft of goods,⁵ deceit,⁶ defamation,⁷ or malicious prosecution,⁸ committed by their servants.

12. Wrong done for the servant's own benefit or amusement.—The fact that the servant did the wrong for his own purposes, convenience or benefit, or against the master's express orders would be material in ascertaining whether the wrong was of the class of authorised acts or incidental to them, but would not preclude liability if the wrong is found to be of that description.⁹ A driver who takes the master's car out without his knowledge or authority for a joy ride with his friends will not make the master liable for an accident on the way.¹⁰ If while driving the car on

1. *Allen v. L. & S. W. Ry. Co.*, (1870) 6 Q.B. 65; *Hanson v. Waller*, (1901) 1 K.B. 390; *Stedman v. Baker*, (1896) 12 T.L.R. 451; *Stevens v. Midland Counties Ry. Co.*, (1854) 10 Ex. 352; *Edwards v. Midland Ry. Co.*, (1880) 6 Q.B.D. 287; *Cullimore v. Savage South Africa Co.*, (1903) 2 Ir. R. 589; *Charleston v. London Tramways Co.*, (1883) 32 Sol.J. 557.

2. (1938) 3 A.E.R. 517.

3. *Bolingbroke v. Swindon Local Board*, (1874) L.R. 9 C.P. 575; *Goh Choon Seng v. Lee Kim Soo*, (1925) A.C. 550; *Hussey v. Field*, (1835) 2 C.M. & R. 432 (invasion of a right of ferry); cf. *Joseph Rand Ltd. v. Craig*, (1919) 1 Ch. 1 (master held not liable when servants to save themselves trouble tipped refuse on plaintiff's land instead of on land set apart for the purpose).

4. *Armory v. Delamirie*, (1721) 1 Stra. 505; Sm. L.C., Vol. I, 393; above, Chap. V, paras. 26 and 60.

5. *Abraham v. Bullock*, (1902) 86 L.T. 796; cf. *Cheshire v. Bailey*, (1905) 1 K.B. 237; *Giblin v. McMullen*, (1868) L.R. 2 P.C. 317.

6. *Hern v. Nichols*, (1700) 1 Salk. 289; *Lloyd v. Grace, Smith & Co.*, (1912) A.C. 716; *Barwick v. English Joint Stock Bank*, (1867) L.R. 2 Ex. 259; cf. *Newlands v. National Employers' Accident Association*, (1885) 54 L.J.Q.B. 428; *Whitechurch v. Cavanagh*, (1902) A.C. 117.

7. *Citizens' Life Assurance Co. v. Brown*, (1904) A.C. 423; *Mati Lal v. Indra Nath*, (1909) I.L.R. 36 Cal. 907; 13 C.W.N. 1165; cf. *Glasgow Corporation v. Lorimer*, (1911) A.C. 209 (where a corporation was held not liable for a slander by one of its tax collectors in the course of a wordy altercation with the tax-payer).

8. *Abrath v. N.E. Ry. Co.*, (1886) 11 A.C. 247; *Sarat Chandra Roy v. Dawlat Singh*, (1905) 10 C.W.N. 723; *Municipal Board of Mussoori v. Goodull*, (1904) I.L.R. 26 All. 482; 1 A.L.J. 195; cf. *Raghunath v. Motiram*, 1933 Nag. 299.

9. For other illustrations, see *Stevens v. Woodward*, (1881) 6 Q.B.D. 318 (clerk using lavatory room of employer in his absence and negligently leaving off tap turned; employer not liable); cf. *Ruddiman v. Smith*, (1889) 60 L.T. 708 (a similar case where the tap was in the servant's room and master held liable).

10. *Sanderson v. Collins*, (1904) 1 K.B. 628; cf. *Britt v. Galmoye*, (1928) 44 T.L.R. 294.

the master's business the driver took a detour to call on a friend of his own, the master may be liable,¹ but not if the deviation from the authorised route was so complete that it could not be regarded as incidental to the performance of his work.² If, however, the car was entrusted to the driver to be used as he liked during the day and he used it for his own purpose, the master will be liable.³ Where the plaintiff complained of injury caused by the negligence of a boy who was employed by the defendants as a roundsman and who knocked her down while he was riding his employers' bicycle with his employers' manager's permission, in going home to his dinner, it was held that his negligence was not in the course of his employment and the defendants were not liable.⁴ A taxi-company was held liable for an injury which occurred while a driver of theirs was driving a car under the orders of their general manager for the latter's use, though the car had been reserved for the exclusive use of a customer and the general manager had no authority to use it.⁵ The driver had no reason to suppose that the order was improper, and was held to be acting in the defendants' employment. A local authority was held liable when a schoolmistress employed in one of their elementary schools ordered a young pupil to go and poke the fire in the stove in the tiffin room for preparing her tiffin, and the girl while doing so, sustained injury by her clothes catching fire⁶. The order was regarded as reasonably incidental to the discipline which a teacher is expected to exercise over the pupils. In *Jefferson v. Derbyshire Farmers, Ltd.*,⁷ a servant of the defendants who were using the plaintiff's premises as a garage lit his pipe and threw the match on the floor while drawing motor spirit from a drum. The spirit caught fire and the shed was burnt. The defendants were held liable as the servant's act was a negligent performance of his work, viz., drawing motor spirit. This decision was approved in a similar case decided by the House of Lords, *Century Insurance Co. v. N. I. Road Transport Board*,⁸ already referred to. It was

1. *Joel v. Morrison*, (1834) 6 C. & P. 501, per Parke, B.; *Aitchison v. Page Motors*, (1936) 154 L.T. 128; *Roberts v. Shanks*, (1925) 27 Bom. L.R. 548; 1925 Bom. 360; *Stanes Motors, Ltd. v. Vincent*, (1935) 1 L.L.R. 59 Mad. 402; 70 M.L.J. 155.

2. *Storey v. Ashton*, (1869) L.R. 4 Q.B. 476; *Mitchell v. Crassweller*, (1853) 13 C.B. 237, 243; *Rayner v. Mitchell*, (1877) 2 C.P.D. 357.

3. *Venables v. Smith*, (1877) 2 Q.B.D. 279.

4. *Higbid v. Hammett, Ltd.*, (1932) 49 T.L.R. 104.

5. *Irwin v. Waterloo Taxi-Cab Co.*, (1912) 3 K.B. 588.

6. *Smith v. Martin*, (1911) 2 K.B. 775; See *Fryer v. Salford Corporation*, (1937) 1 A.E.R. 617 (child's apron catching fire during instructions in cookery, school authority held liable). For other cases of negligence of schoolmasters, see *Jones v. London County Council*, (1932) 48 T.L.R. 577; *Ransthorpe v. Ottley*, (1937) 3 A.E.R. 907.

7. (1921) 2 K.B. 281.

8. (1942) A.C. 509. The H.L. overruled *Williams v. Jones*, (1866) 3 H. & C. 602, and approved the minority view of Blackburn and Mellor, JJ. therein. There a carpenter working in a shed lighted his pipe from a match which he threw on the floor. It was held that for the fire and injury resulting, his employer was not liable.

held in that case that the negligent act of the driver in lighting a cigarette and throwing away the lighted match on the floor while petrol was being discharged through a pipe into a tank was in the course of his employment. Therefore his employers would be liable and their insurers were bound to pay for the damage.

13. Delegation by a servant.—When a person's servant delegates his work to another without his authority or knowledge and for his own benefit or convenience, the master will not be liable for the wrong committed by the delegate as there is no relationship of master and servant between these persons. He would not also be liable for the negligence of the servant in delegating the work to another as delegation is not within the implied authority of a servant.¹ Even in cases of emergency there is no authority to delegate if the master could be communicated with.² When a driver allows a conductor to drive a bus in his presence and an injury results, the case is not one of delegation but improper performance of the driver's work and the master may be liable.³

14. Liability of a corporation.—It is on the principle of vicarious liability that corporations are made to pay damages from their funds for wrongs which they themselves are incapable of committing.⁴ They are liable even for torts requiring a mental element as an ingredient, though they themselves have no mind, *e.g.*, malicious prosecution,⁵ malicious libel,⁶ deceit.⁷ In India local authorities like municipalities and district boards have been held liable for the faults of their officers or servants.⁸ On the question whether a corporation can be held liable for an *ultra vires* tort, there is a difference of opinion among text writers⁹ but the weight of authority is in favour of the view that a corporation would be liable for the tort of its servant committed in the course of some enterprise or business which, though *ultra vires* or beyond its corporate powers, was expressly authorised or ratified by it. In other cases a corporation may not be liable.

1. *Gwilliam v. Twist*, (1895) 2 Q.B. 84; *Cox v. Midland Counties Ry. Co.*, (1849) 3 Ex. 268.

2. *Houghton v. Pilkington*, (1912) 3 K.B. 308.

3. *Ricketts v. Tilling*, (1915) 1 K.B. 644; see also *Wheatley v. Patrick*, (1837) 2 M. & W. 650.

4. *Mersey Docks and Harbour Board v. Gibbs*, (1864) L.R. 1 H.L. 93; above, Chap. VI, para. 16; below, Chap. XIX, para. 22.

5. Above, Chap. VIII, para. 13.

6. Above, Chap. VII, para. 29.

7. Chap. IX, para. 15.

8. *Vizagapalam Municipal Council v. Foster*, (1917) I.L.R. 41 Mad. 538; *Jokhu v. Benares Municipal Board*, 1938 All. 66; below, para. 29.

9. Salmond, Torts, pp. 59-62; Winfield, Law of Tort, p. 114; Dr. S. C. Bagchi, Law of Corporations, 1928 (Tagore Law Lectures, 1914), pp. 254-259; *contra*, A. L. Goodhart, Essays in Jurisprudence and Common Law, p. 91; Clerk & Lindsell, Torts, pp. 55, 56; Jenks, New Jurisprudence, pp. 115, 116. In *Poulton v. London & S. W. Ry. Co.*, (1867) L.R. 2 Q. B. 534, above, para. 10, the dictum of Blackburn, J., was against liability and was the starting-point of the controversy. *Campbell v. Paddington Corporation*, (1911) 1 K.B. 869, however, favoured liability.

15. Policy of the rule of employers' liability.—The rule of employers' liability for torts of servants in the course of their employment is in its present form a remarkable instance of judicial legislation in modern times. It was developed by judges during the second half of the last century to meet the situation created by the growth of rich corporations like railway companies who could act only through their agents or servants and by the great scope in modern conditions of life for injuries by servants who are themselves too poor to make reparation to the persons injured. Its policy and rationale may be stated to be that the employment of servants is in the nature of an ultra-hazardous activity¹ and the business or industry for which they are employed should in justice bear the cost of repairing the harm which is involved in its prosecution. A similar policy underlies the Workmen's Compensation Act. These policies are in effect carried out by employers insuring themselves against liability for injury to third parties as well as to their workmen. The owners of motor cars are compelled by statute in England to insure themselves against third-party risks and similar legislation² has been enacted, though it has not yet been brought into force, in India. The liability of the employer does not depend on any fault of his by way of failure to control his servants. Indeed in many cases there may not be even a possibility of control. Therefore phrases appropriate to the policy of an older age are unsuitable guides in working the modern rule. That this rule is in accordance with prevalent ideas of social justice³ is evidenced by legislation like the Employers' Liability and Workmen's Compensation Acts. During the last fifty years in England,⁴ it has advanced by rapid strides and even in the field of crime.⁵

16. History of the rule of employers' liability.—The history of the doctrine shows that its scope was determined by the social conditions and needs of different times.⁶ If we go back far enough into the past, we shall see a measure of responsibility much severer than the present rule. A man was absolutely liable for the act of his slave

1. Above, Chap. XV, para. 1.

2. Motor Vehicles Act, IV of 1939, Chap. VIII.

3. See, however, Baty, Vicarious Liability, p. 150; see also Bramwell, B., in *Collett v. Foster*, (1857) 2 H. & N. 356; Jessel, M.R., in *Smith v. Keal*, (1882) 9 Q.B.D. 349.

4. As to American law, see Burdick, Torts, pp. 154-219; Cooley, Torts, Vol. II, Chap. XVIII. In France, the employer is liable only if he cannot prove that he could not have prevented the wrongful act of the servant; French Civil Code, Art. 1384. In Germany there are different rules for different employments: Schuster, German Civil Law, p. 156. As to comparative law on this subject, see Baty, Vicarious Liability Chap. IX.

5. E.g., the Public Health Acts and the Sale of Food and Drugs Act, 1875 (38 & 39 Vict., c. 63, s. 28); *Commissioners of Police v. Cartman*, (1896) 1 Q.B. 655; *Allen v. Whitehead*, (1930) 1 K.B. 211; *Davies v. May*, (1937) 2 K.B. 366; *E. v. Mahadevappa*, (1926) 29 Bom. L.R. 153; *Mawng Ba Cho v. R.*, (1934) I.L.R. 12 Rang. 300.

6. For the history, see Pollock and Maitland, Vol. II, p. 528; Wigmore, Anglo-American Essays, Vol. III, p. 495; Holdsworth, Vol. III, p. 382; Vol. VIII, p. 472; Fifoot, English Law and its Background, p. 177; H.M. Gest, Lawyer and Literature, pp. 227, 233.

or dependant and it was only a later concession that he could escape its penal consequences by a noxal surrender. This rule and its counterpart, *vis.*, the right of the householder or master to demand reparation for an injury to or the taking away of his dependant or slave, prevailed in the laws of the Roman as well as the Germanic peoples and were incidental to their social organisation on the basis of status and kindred. This primitive rule of liability involved not merely reparation but also punishment or vengeance at the hands of the injured person or his kinsmen; and modern distinctions between civil and criminal responsibility were then unknown.¹ By the fourteenth century the change in social conditions and the influence of civilised ideas of justice led to the mitigation of the old rule in the field of criminal law and a person was punished for a wrong done by his servant, only if he had expressly commanded it. A similar rule came to prevail also in an action of trespass which, it may be remembered, came of a penal stock and had originally also a criminal aspect.² This was the position during the next three centuries, but certain exceptions had sprung up. (i) Householders were held liable for damage to their neighbours by fires which started in their houses by the acts of their servants or guests, but not strangers.³ (ii) Bailees in general, and carriers and innkeepers in particular, were absolutely liable for the loss of goods caused by the wrongful acts of their servants or even strangers.⁴ Similarly persons who pursued a particular calling, *e.g.*, a smith, surgeon, vintner, butcher, were liable for damage due to their own or their servant's fault.⁵ (iii) By statute,⁶ bailiffs, sheriffs, gaolers, etc., were made liable for the misdeeds of their servants in or about the duties pertaining to their office. By the seventeenth century the growth of commerce and industry had brought principles of the law of agency into prominence. The liability of an owner or master of a ship for the fault of the crew which was enforced by the courts of Admiralty on the analogy of the Roman law became ultimately a rule of the common law courts which took over a greater part of the Admiralty jurisdiction during the seventeenth century. These principles were co-ordinated and given a formal expression by Holt, C. J., who is regarded as the founder of the modern rule of employer's liability for unauthorised acts of their servants. He held in a number of cases⁷ that a master or principal was liable for the act of his servant or agent, if his command or authority could be implied, though it was not express, as where the agent acted 'on behalf of the master' or 'for his benefit' or was 'about his business.' In the nineteenth century the doctrine of implied command was enlarged to suit new conditions and superseded by a new one, *vis.*, that the wrong should be 'within the scope of the servant's authority,' or 'of the class of authorised acts.' The persistence of phrases like 'for the master's benefit' even after the old theory to which they were appropriate had been given up, led to a misconception which was removed by the decision of the House of Lords in *Lloyd v. Grace, Smith & Co.*⁸

17. Employer's liability for servant's tort not in course of employment.—An employer may be liable for his servant's tort indepen-

1. Above, Chap. I, para. 5; Chap. XIV, para. 101; Chap. XV, para. 14.

2. Above, Chap. I, para. 11.

3. *Beaulieu v. Fingham*, (1401) Y. B. 2 Hen. IV, fo. 18, pl. 5; above, Chap. VI, para. 73.

4. Above, Chap. XV, paras. 6 and 12; Holdsworth, Vol. III, p. 386.

5. Holdsworth, Vol. III, p. 386.

6. Statute of Westminster II, c. 2; for others, see *P. & M.*, Vol. II, p. 533. The phrase *respondet superior* comes from these statutes.

7. *E.g.*, *Bolton v. Sandford*, (1795) 2 Salk. 440; *Tuberville v. Stampe*, (1698) 1 Ld. Raym. 264; *Hern v. Nichols*, (1795) 1 Salk. 289; for other cases, see Holdsworth, Vol. VIII, p. 476.

8. Above, para. 9.

dently of the rule now discussed in certain cases. (a) The engagement of the servant may amount to negligence. Thus a clock-repairer who negligently engaged a dishonest servant without enquiry into his antecedents was held liable for theft of jewellery by that servant whom he (the employer) had sent to his customer's house to wind a clock there.¹ But if there was no negligence in engaging the servant, the defendant would not be liable.² (b) By reason of a contractual or other special obligation, e.g., a bailee's or common carrier's liability for loss of a chattel entrusted to him due to his servant's dishonesty.³

17-A. True category of employers' liability.—We are accustomed to regard this liability as delictual or pertaining to the law of torts. This is partly because the remedy against the employer in the old procedure was the action on the case which was a delictual form of action and partly also because the employer's liability for his servant's tort was at an earlier time associated with some fault which could be imputed to him. But in view of the extension of the rule in recent times it is worthwhile noting that the employer is now held liable absolutely, though he has committed no tort whatever. His liability is based more or less on a policy of social insurance and to regard it as tortious is a fiction, at all events at the present day. But this fiction appears to be responsible for importing notions into this branch of law which can be justified only on the basis that the employer's liability is for a tort. Thus as we will see presently the King is not in England liable for the tort of his servants and the remedy of petition of right which is available in cases other than tort, e.g., breach of contract, is not available for his servant's tort. A similar immunity is also conceded to the Governments, Central and Provincial, in India. It would seem that these results may not be so unquestionable as they are now treated by the courts, if employers' liability is assigned to its proper and an independent category and not to the sphere of tort.⁴

18. Exceptions to the rule of employers' liability.—To the rule of employers' liability for torts of servants in the course of employment, there are two exceptions: (a) the doctrine of common employment, (b) the immunity of the Crown from liability for the torts of its servants.

19. Doctrine of common employment.—The doctrine means that a master is not liable to a servant who is injured by the wrongful act of a fellow-servant who is at the time in a common employment with him. It was first propounded by Lord Abinger in *Priestley v. Fowler*.⁵ In that

1. *De Parrell v. Walker*, (1932) 49 T.L.R. 37.

2. *Mints v. Silvertown*, (1920) 36 T.L.R. 399.

3. Above, para. 11, note 5. See also Carriage of Goods by Sea Act, (XXVI of 1925) Sch. Art. IV, s. 2 (g); *Brown v. Harrison*, (1927) 96 L.J.K.B. 1025.

4. Above, Chap. I, para. 20.

5. (1837) 3 M. & W. 1.

case, the plaintiff alleged that he was directed by the defendant, his employer, to go in a van conducted by another servant, and the van, being in an unsafe condition and overloaded, broke down, and the plaintiff's thigh was fractured. Lord Abinger dismissed¹ the action on the ground that a servant must be deemed by accepting the service to have consented to take its risks also, and that these risks include the faults of his fellow-servants. The doctrine was confirmed soon after by Shaw, C. J., in the Supreme Court of the United States² and by Baron Alderson in an English case.³ It was explained by these judges on other grounds also besides that of consent, *viz.*, first, that there was an implied contract of the servant to take the risks of the negligence of his fellow-servants, and secondly, that the relation between master and servant being governed by contract the parties had no rights or duties apart from the contract, and the servant cannot recover in the absence of a contract on the part of the master to indemnify him against such risks. Thus it happened that while the rule of employers' liability was being enlarged, it was in a particular application of it narrowed by a cross-current of judicial policy. The doctrine became unpopular and was open to the reproach that it favoured employers at the expense of workmen. The result was the passing of the Employers' Liability Act, 1880,⁴ which introduced a number of exceptions to it. In cases not falling under the Act, it is still applicable. But courts are in no mood to extend it and would rather incline to restrict its operation. This is illustrated by two recent decisions of the House of Lords.⁵ Besides the rule rests for its support, in part, on the well-known but now exploded fallacy that parties to a contract are immune from obligations under the general law and outside the terms of the contract.⁶

20. The doctrine of common employment in India.—It was held in an Allahabad case⁷ that in the absence of similar legislation the doctrine was applicable, but it is very doubtful if Indian courts are bound to follow a rule which is admitted to be unjust, and has been abrogated by statute in England in the case of important employments.⁸ This view has now been

1. "Indignantly"; see *Radcliffe v. Ribble Motor Services Ltd.*, (1939) A.C. 215 at p. 238.

2. *Farwell v. Boston and Worcester Railroad Corporation*, (1842) 4 Metc. (Mass.) 49, printed in 3 Macq. (H.L.Sc.) and 149 R. R. 262.

3. *Hutchinson v. York & Newcastle Ry. Co.*, (1850) 5 Ex. 343 "Lord Abinger planted it, Baron Alderson watered it, and the Devil gave it increase", Kenny, *Cases on Torts*, p. 90. See also *Tunney v. Midland Ry. Co.*, (1866) L.R. 1 C.P. at p. 296, *per* Erle, C.J.

4. Below, para. 25.

5. *Wilsons and Clyde Coal Co. v. English*, (1938) A.C. 57, 79; *Radcliffe v. Ribble Motor Services Ltd.*, (1939) A.C. 215; below, para. 21.

6. Above, Chap. XIV, para. 60.

7. *Blanchette v. Secretary of State for India*, (1912) 9 A.L.J. 173 : 13 L.C. 417; see also *Abdul Aziz v. Secretary of State*, (1931) 26 Sind L.R. 282.

8. Pollock, *Torts*, (13th Ed.), p. 628, note (u); W. A. Robson, 51 L.Q.R. 196.

taken in a considered decision of the Nagpur High Court,¹ where Stone, C. J., observed, "when one finds a rule has been abrogated by legislation that rule becomes an unsafe guide." In a Privy Council decision Lord Wright referred to this Nagpur case apparently with approval but did not express any final conclusion on the question.²

21. Cases where the doctrine of common employment does not apply.—The doctrine is not applicable where the injury to a workman is due to the following causes: (a) Negligence or want of due care of the employer in respect of his three-fold obligation to his servant, viz., to provide the servant, first, with competent fellow-servants, either by selecting such servants or discharging incompetent ones,³ second, with proper plant, machinery or material and third, with a proper system of work and effective supervision.⁴ These duties of the employer to the employee have long been recognised but as some of them could rarely be discharged by the employer himself and could only be entrusted to competent and skilled servants, the question has arisen whether he could plead their negligence as a defence to an action by an injured workman. In *Fulton v. Denville*,⁵ the Court of Appeal held that he could; but this is no longer law after the decision of the House of Lords in *Wilsons & Clyde Coal Co. v. English*.⁶ In this case, the defendants, mine-owners, were sued for injury to a workman in one of their mines resulting from an unsafe system of work and it was held that they were liable and could not plead as a defence that they had delegated their duty to provide a safe system of work to a competent servant. "It is the obligation which is personal to the employer and not the performance." "It is his personal duty, whether he performs, or can perform it himself, or whether he does not perform it, or cannot perform it, save by servants or agents."⁷ It was also held in this case that the defence was not available for another reason, viz., that the servant to whom the employer's duty was delegated, was not, in the discharge of that function, engaged in a common employment with the injured workman. Undoubtedly this is a decision of great importance in this branch of law and has the result of curtailing the operation of the doctrine of common

1. *Secretary of State v. Rukhmini Bai*, I.L.R. 1938 Nag. 54; 1937 Nag. 354, 368 (action under the Fatal Accidents Act by representatives of employee of G. I. P. Ry., killed by negligence of fellow-employee, allowed).

2. *Brooklebank Ltd. v. Noor Ahmde*, 1940 P.C. 225.

3. *Senior v. Ward*, (1859) 28 L.J.Q.B. 139; *Tarrant v. Webb*, (1856) 18 C.B. 797; *Jones v. Canadian Pacific Ry. Co.*, (1913) 83 L.J.P.C. 13.

4. *Wilsons & Clyde Coal Co. v. English*, (1938) A.C. 57 at 78, 86. See also *Smith v. Baker*, (1891) A.C. 325; *Monaghan v. Rhodes*, (1920) 1 K.B. 487; *Cole v. De Trafford* (No. 2), (1918) 2 K.B. 523; *Toronto Power Co. v. Paskwan*, (1915) A.C. 724; *Speed v. Thomas Swift & Co. Ltd.*, (1943) 1 A.E.R. 539 C.A.; *Garcia v. Harland and Wolff Ltd.*, (1943) 1 K.B. 731; *Dhanal v. Rangoon Indian Telegraph Association*, (1935) I.L.R. 13 Rang. 369. See below, Chap. XVIII, para. 27.

5. (1932) 2 K.B. 309.

6. (1938) A.C. 57.

7. (1938) A.C. at pp. 81, 84, per Lord Wright; see also at p. 75, per Lord Macmillan.

employment and thereby enhancing the responsibility of employers who have necessarily to entrust the technical management of their business or industry to skilled servants. In *Russell v. Criterion Film Production, Ltd.*,¹ a film actress was injured by the intensity of the lighting in a ball-room scene. The film company was held liable as it was the system of lighting that was at fault and the defence of common employment was not therefore available. (b) The employer's own personal negligence. In *Olsen v. Corry and Gravesend Aviation, Ltd.*,² the plaintiff, an apprentice with the defendants, a firm of ground engineers in an aerodrome, was injured while swinging the propeller of an aeroplane piloted by their instructor. It was found that the injury was due partly to the negligence of the instructor and partly to the faulty system of starting an aeroplane taught by the defendants. The defendants were held liable as they had undertaken to teach and their negligence in adopting a faulty system of tuition was an answer to their plea of common employment. (c) The breach of a duty imposed by statute on the employer, e.g., a duty under the Factories Acts to fence dangerous machinery.³ (d) Cases of absolute⁴ and strict⁵ liability under the common law. The person on whom such liability is imposed cannot divest himself of it by employing an independent contractor any more than an employer can do so in respect of his obligations to his servant under the common law or statute. Therefore it would appear to follow from the decision in *Wilsons & Clyde Coal Co. v. English*,⁶ that the defence of common employment should not be available in the former case also. The point has however not been directly decided.⁷

22. Conditions of the defence of common employment.—There are two conditions for the defence being available: (a) that the workman who was in fault and the one who was injured were in the service of a common master, and (b) that they were at the time in a common employment.

23. Fellow-workmen of the same master.—The test for finding out whether the relationship of master and servant exists between two persons has already been discussed. The servants of a contractor are not fellow-servants with those of the ultimate employer or of a contractor engaged in another part of the work.⁸ A superior and an inferior servants are

1. (1936) 3 A.E.R. 627. See also *Naismith v. London Film Productions Ltd.*, (1939) 1 A.E.R. 794 C.A. (plaintiff employed as a crowd extra in a film and covered with inflammable material, nature of duty to her).

2. (1936) 155 L.T. 512; distinguishing *Cribb v. Kynoch*, (1907) 2 K.B. 548.

3. Below, Chap. XVII, para. 2.

4. Above, Chap. XV, paras. 1 and 2.

5. Above, Chap. XV, para. 4.

6. (1938) A.C. 57.

7. In *Knott v. L. C. C.*, (1934) 1 K.B. 126, at p. 140, (see also above, Chap. VI, para. 69, p. 215, note 12), a case of injury due to keeping a dangerous animal, Lord Wright was inclined to take the above view but did not decide the point.

8. *Cameron v. Nystrom*, (1893) A.C. 308; *Johnson v. Lindsay*, (1891) A.C. 371.

fellow servants for this purpose.¹ The directors or manager of a corporation acting on its behalf, are not however fellow-servants of their inferiors and their acts are treated for this purpose as those of the employer, *viz.*, the corporation.² The term 'fellow-servant' includes a volunteer, *i.e.*, a person who voluntarily assists a servant in the performance of his work. In *Degg v. Midland Railway Co.*,³ a person who volunteered to assist the servant of the defendants, a railway company, in turning a truck on a turn-table was run over by an engine and killed while doing so. It was held that he was a fellow-servant and his representatives could not sue the company. This appears to be an artificial method of stating the true ground of the decision, which is that the employer owes no duty to take precautions for the safety of a person who is a trespasser or bare licensee or voluntarily exposes himself to risks. When that person is an invitee on business, the result is otherwise. In *Wright v. London and North Western Railway Co.*,⁴ the plaintiff was the owner of a heifer which was conveyed in a railway. He assisted the railway servants in shunting the waggon into a siding for unloading the animal and was run over by a train on the siding. It was held that he was entitled to recover against the railway company. As the rule of common employment has been rested on the fiction of implied contract, it would seem that it has no application to cases where there is no contract at all and its extension to volunteers is unjustified.⁵ It would obviously not apply to a young volunteer, aged ten, incapable of taking care of himself.⁶ A person whom the master is compelled to employ, *e.g.*, a compulsory pilot,⁷ and one who is compellable to work, *e.g.*, a pauper in a work-house⁸ are not servants for this purpose.

24. Common employment.—If this phrase is understood to imply that a servant is so placed in relation to another that the former is in a position to know the capacity and competence of the latter and the risks of working with the latter or has an opportunity of guarding himself against

1. *Hedley v. Pinkley Steamship Co.*, (1894) A.C. 222; *Wilson v. Merry*, (1868) L.R. 1 H.L. Sc. 326.

2. *Lennard's Carrying Co. v. Asiatic Petroleum Co.*, (1915) A.C. 705; *Baker v. James*, (1921) 2 K.B. at p. 684; *Yelland v. Powell Duffryn Associated Collieries*, (1941) 1 K.B. 154 C.A.

3. (1857) H. & N. 773; see *Potter v. Faulkner*, (1861) 1 B. & S. 800; *Bromley v. Collins*, (1936) 2 A.E.R. 1061.

4. (1876) 1 Q.B.D. 252; see also *Holmes v. N. E. Ry. Co.*, (1871) L.R. 4 Ex. 254; 6 Ex. 123; *Hayward v. Drury Lane Theatre*, (1917) 2 K.B. 899; *Lomas v. Jones & Son*, (1943) 2 A.E.R. 548 C.A.

5. *Radcliffe v. Ribble Motor Services Ltd.*, (1939) A.C. 215 at p. 247, per Lord Wright.

6. *Holdman v. Hamlyn*, (1943) 1 K.B. 664 C.A. The rule may apply to a person below age, who can take care of himself; *Young v. Hoffman Manufacturing Co., Ltd.*, (1907) 2 K.B. 646.

7. *Smith v. Steele*, (1875) L.R. 10 Q.B. 125.

8. *Tensland v. West Ham Union*, (1906) 1 K.B. 538.

the results of the latter's negligence, the rule of common employment would have a plausible claim to be regarded as just. But that is not how the phrase is interpreted.¹ It is said to mean that the servants are engaged for purposes of the same general business though in different parts or details of it, *e.g.*, the engine-driver, station-master, guard, plate-layer, pointsman of a railway company,² a carpenter working on the roof of an engine-shed and porters moving an engine on a turn-table,³ a chorus-singer and scene shifter of a theatre.⁴ A master and crew of one ship are not in common employment with those in another ship of the same owner.⁵ In *Radcliffe v. Ribble Motor Services Ltd.*,⁶ the House of Lords held that the drivers employed by a motor transport company and taking parties by their motor coaches between specified destinations were not in a common employment. Therefore when one of the drivers was knocked down and killed owing to the negligence of another driver, while standing in a street near his coach on his return journey to the employers' garage, his widow was held entitled to recover. It is always difficult to define the limits of a doctrine which is based on sheer fiction, especially when it has, whatever justification it had originally, no claim to it in modern conditions of large-scale industry. As Lord Wright observed, "It is difficult sometimes to fit a factual qualification on a fictitious contract." He however proceeded to state the qualification thus: the common employment is common work, that is, work which necessarily and naturally, or in the usual course, involves juxtaposition, local or causal, of the fellow-employees and exposure to the risk of the negligence of the one affecting the other. Whether the employments are in different parts of the same work or wholly unconnected is a question of fact in each case.⁷ It is hardly necessary to add that even if this rule applies and the employer cannot be sued, the workman who causes the injury is liable to his fellow-workman.⁸

25. The Employers' Liability Act.—The Employers' Liability Act⁹ was passed in England in 1880. It was a temporary Act to last till the end of 1887¹⁰ but has been renewed from time to time. It takes away the defence of common employment in actions by injured workmen or their

1. See *per Shaw, C.J.*, in *Farwell's case*, above, page 501, note 2; also note 3 below.

2. *Turner v. S. P. & D. Ry. Co.*, (1875) 1 A.L.J. 653.

3. *Morgan v. Vale of Neath Ry. Co.*, (1864) 5 B. & S. 570.

4. *Burr v. Theatre Royal*, (1907) 1 K.B. 544.

5. *The Petrel*, (1893) P. 320.

6. (1939) A.C. 215, 249.

7. *E.g.*, *Coldrick v. Partridge Jones & Co.*, (1910) A.C. 77; (1909) 1 K.B. 530; *Wilsons & Clyde Coal Co., Ltd., v. English*, (1938) A.C. 57, above, para. 21; *Metcalfe v. London Passenger Transport Board*, (1938) 2 A.E.R. 352.

8. *Lees v. Dunkerley Bros.*, (1911) A.C. 5.

9. 43 & 44 Vict., c. 42.

10. S. 10.

representatives in certain cases specified by the Act.¹ The workman cannot recover if he knew of the defect or negligence which caused the injury and did not give notice of it to the employer or some superior servant, unless he was aware that the employer or such superior already knew of it.² Other common law defences like contributory negligence³ or consent⁴ can also be raised. A workman may expressly contract himself out of the Act and lose its benefit.⁵ Recovery of relief under the Act bars the prosecution of a common law action for damages.⁶ In actions under the Act the damages are limited to a maximum of three years' earnings. In England cases under this Act have become rare⁷ after the Workmen's Compensation Act.

26. Workmen's Compensation Act.⁸—This Act, like the Employers' Liability Act, deprives the employer of the defence of common employment, but it differs from the latter Act in that it creates a special right and a special procedure outside the ordinary law. Its provisions have been noticed already.⁹

27. Immunity of the Crown for the torts of its servants.—No action lies against the King for any wrong done by his servants acting under his authority, express or implied. This follows from the well-known doctrine that the King can do no wrong, which means really that he is exempt from being sued in his own courts. If he cannot be sued in respect of his own acts, much less can he be sued for the acts of his servants.¹⁰ In England the remedy by petition of right is the only civil remedy open to a subject against the Crown. It is available for a breach of contract¹¹ by the officers of the Crown or for recovery of money, land or goods wrongfully taken by them, but not where the claim is merely for damages for a tort.¹² Though no remedy for a tort can be had against the King, it exists personally against the officer who does the wrong, and the

1. Ss. 1, 2. 2. S. 2 (3). 3. *Webbin v. Ballard*, (1886) 17 Q.B.D. 122.

4. *Smith v. Baker*, (1891) A.C. 325. 5. *Griffiths v. Dudley*, (1882) 9 Q.B.D. 357.

6. *Hills v. Co-operative Wholesale Society*, (1940) 2 K.B. 435.

7. *James Nimmo & Co. v. Connell*, (1924) A.C. 595 at p. 623. For a recent case, see *Avery v. L.N.E.R. Co.*, (1938) 2 A.E.R. 592 (H.L.) (quantum of damages for representative of deceased workman).

8. (1897) 60 & 61 Vict., c. 37; (1906) 6 Ed. 7, c. 58; (1925) 15 & 16 Geo. 5, c. 84. In India, Act VIII of 1923. 9. Above, Chap. II, para. 8.

10. *Feather v. The Queen*, (1865) 6 B. & S. at p. 296, *per* Cockburn, C. J. This was used in the course of early constitutional struggles to limit the King's power to act otherwise than through his servants against whom the law provided a remedy: see Holdsworth, Vol. III, p. 388.

11. *Brocklebank v. The King*, (1925) 1 K.B. 52, 68 (implied contract); *Buckland v. R.*, (1938) 1 K.B. 329 (for detainee); below, Chap. XIX, para. 16.

12. *France, Fenwick & Co. v. R.*, (1927) 1 K.B. 458; *Civilians War Claimants Association v. R.*, (1932) A.C. 14, 24. In some colonies the remedy is allowed for tort by statute; 33 L. Q. R. pp. 12, 13; N. S. Wales Act, 39 Vict., c. 38, referred to in *Farnell v. Bowman*, (1884) 12 A.C. 643.

King's command is *per se* no defence to him.¹ The liability of the officer is personal and cannot be satisfied from the public revenue.² The position is exactly the reverse in the case of a breach of contract made by a servant of the Crown on behalf of the Crown; no action will lie against the servant or agent but the only remedy is a petition of right against the Crown.³ The right of suit against particular officers or departments of the Government and of recourse to public funds for realising damages is generally regulated by statute. The liability of the Government in India for wrongs committed by its servants requires to be separately considered.

28. Liability of the Government in India for torts of its servants.—This was till recently governed by the Government of India Act, 1858, which was passed on the transfer of the territories vested in the East India Company to the Crown, and by later Acts ending with the Act of 1919 and re-enacting the Act of 1858 with similar provisions on this matter. It is now governed by the Government of India Act, 1935.

29. The Government of India Acts (1858-1919).—These contained the following provisions,⁴ first, the Secretary of State for India in Council may sue and be sued by that name as a body corporate; secondly, every person shall have the same remedies against the Secretary of State for India in Council as he might have had against the East India Company if the Act of 1858 had not been passed; thirdly, neither the Secretary of State nor any member of his Council shall be personally liable in respect of any liability incurred by the Secretary of State for India in Council in his or their official capacity, but all such liabilities, and all costs and damages in respect thereof shall be borne by the revenues of India.⁵ The second of these provisions determined the extent of the vicarious liability of the Government for its servants' wrongs, while the other two regulated the procedure in suing for and recovering damages. The second provision was interpreted to mean that a suit against the Government would not lie in those matters in which it acted in the exercise of sovereign functions possessed by it and by the East India Company before it⁶; *e.g.*, making war or treaty, annexation of a native state,⁷ commandeering goods during a war,⁸ quelling a civil disturbance with the help of soldiers,⁹

1. *Rogers v. Rajendro Dutt*, (1860) 8 M.I.A. 103; above, Chap. I, page 34, note. 1.

2. *Palmer v. Hutchinson*, (1881) 6 A.C. 619; *Kynaston v. A.G.*, (1933) 49 T.L.R. 300.

3. *Gilligan v. Minister of Health*, (1932) 1 Ch. 86.

4. S. 32 of the Act of 1919; S. 65 of the Act of 1858.

5. See also S. 20 (2) of the Act of 1919.

6. *Secretary of State for India v. Kamatche Boye Sahaba*, (1859) 7 M. I. A. 475, 529; see below, Chap. XVIII, para. 8.

7. *Secretary of State for India v. Kamatche Boye Sahaba*, above.

8. *Kessoram Podar & Co. v. Secretary of State for India*, (1926) L. L. R. 54 Cal. 969.

9. *Yousif Abid v. Secretary of State*, 1937 Sind. 130.

administering justice through courts.¹ But a suit lies against the Government for wrongs done by its servants in the course of transactions which any private person could engage in and which the East India Company as a trading company engaged in ; e.g., a railway, dockyard, factory. This rule was laid down by Sir Barnes Peacock, Chief Justice of the Supreme Court of Calcutta, in *P. & O. Steam Navigation Co. v. Secretary of State for India in Council*.² He held the Government liable for damages for injury due to the negligence of some of its servants employed in its dockyard in the Hooghly. This rule has been since accepted by the Indian High Courts. It has been held that the maintenance of a military road in Malabar,³ or the management of a proprietary estate by the Court of Wards,⁴ the maintenance of a hospital⁵ and the provision of facilities for bombing practice⁶ were acts in the exercise of sovereign functions and a suit would not lie against the Government for the faults of its servants employed for the above purposes. But an action was allowed for injury due to the fall of a gate in a public garden maintained by the Government.⁷ One cannot help expressing a doubt whether the principle of sovereign acts could be applied to some of the cases just mentioned, e.g., maintaining a road or hospital. In cases of sovereign acts a distinction has been recognised between acts of State and acts purporting to be done under colour of municipal law or statute. The former are not justiciable in ordinary courts of law and no suit will lie either against the Government or against the officer concerned in a sovereign act like the annexation of territory. The latter stand on a different footing and actions have been allowed against the Government for the illegal levy of customs under a Customs Act,⁸ the illegal acquisition of land under the Land Acquisition Act,⁹ the improper dismissal of a

1. *Mata Prasad v. Secretary of State for India*, (1929) I. L. R. 5 Luck. 157 ; see also *Panchaeti Akhara v. Secretary of State for India*, (1922) I. L. R. 44 All. 573 ; 20 A.L.J. 420 ; *Radhakishen v. Secretary of State for India*, (1905) 9 C. W. N. 495 ; *Municipal Corporation of Bombay v. Secretary of State for India*, 1934 Bom. 277 ; 36 Bom. L. R. 568 ; *Bateshwari Prasad v. Secretary of State*, 1937 All. 158 (recovery of fine through courts).

2. (1861) 5 Bom. H. C. Appx. p. 1. Cf. The similar distinction drawn between the corporate and governmental functions of municipalities in the U. S. A. ; Dillon, *Municipal Corporations* (5th Ed., 1911) § 1643 ; 44 Har. L. R. 302, 303.

3. *Secretary of State for India v. Cockcroft*, (1914) I. L. R. 39 Mad. 351. But suits against local bodies are not barred ; *Vizagapatam Municipal Council v. Foster*, (1917) I. L. R. 41 Mad. 538 ; above, para. 14 ; also Chap. VI, para. 17.

4. *Secretary of State for India v. Sree Gobinda*, (1932) I.L.R. 59 Cal. 1289 ; 36 C.W.N. 606. 5. *Etti v. Secretary of State*, I.L.R. 1939 Mad. 843 ; 1939 Mad. 663.

6. *Secretary of State v. Nagorao*, I.L.R. 1943 Nag. 511.

7. *Wyllie v. Secretary of State for India*, 1928 Lab. 546.

8. *Haribhanji v. Secretary of State*, (1882) I.L.R. 5 Mad. 273. See *Secretary of State v. Mash & Co.*, I.L.R. 1940 Mad. 599 ; 1940 P.C. 105 ; *Thinych v. Secretary of State*, I.L.R. (1939) 1 Cal. 257.

9. *Rameswar Singh v. Secretary of State*, (1907) I.L.R. 34 Cal. 470 ; 11 C.W.N. 356.

councillor of a municipality under the District Municipalities Act.¹ These cases may fall under certain categories. (a) A claim for recovery of property² or money wrongfully detained by the Government.³ In such cases, actions will lie just as a petition of right lies against the Crown in England. (b) A claim against the Government for damages for an act of an officer purporting to be done in the course of his official duties. It would lie only if the Government had expressly authorised or ratified the wrongful act. In the absence of such express authority, the act would be considered to have been done in the exercise of the authority or discretion vested in him by law or statute and not in pursuance of any implied authority of Government. This principle was enunciated by Wallis, J., as he then was, in a Madras case⁴ where a suit for damages against the Government for loss caused to the plaintiff by the wrongful closing of a labour depot by a District Magistrate purporting to act under statutory powers was dismissed. It has been followed by other courts and the Government has been held not liable for an improper arrest by a police officer,⁵ for loss due to a mistaken payment of money by a Deputy Collector to a person not entitled to it,⁶ for loss due to the negligence of a bailiff in taking insufficient security.⁷ The principle, though accepted by the case-law, appears to have no support either in any statutory provision or in the judgment of Sir Barnes Peacock in the leading case. It appears to introduce without justification the requirement of express authority or ratification in a different part of the subject, *viz.*, liability of a superior

1. *Vijayaraghava v. Secretary of State for India*, (1884) I.L.R. 7 Mad. 466; as to this case, see the remarks of Wallis, J., in *Ross v. Secretary of State*, (1913) I.L.R. 37 Mad. 55: 24 M.L.J. 429; *Secretary of State for India v. Somayya*, 1926 Mad. 1084: 51 M.L.J. at p. 448, *per* Spencer, J.

2. *Secretary of State for India v. Momen*, (1912) I.L.R. 40 Cal. 391 (P.C.): 40 I.A. 48; *Secretary of State for India v. Hiru Mandal*, 1935 Cal. 752.

3. *Kailash Chandra v. Secretary of State*, (1912) I.L.R. 40 Cal. 452: 17 C.W.N. 315; *Wasappa v. Secretary of State for India*, (1915) I.L.R. 40 Bom. 200: 17 Bom. L.R. 979.

4. *Ross v. Secretary of State for India in Council*, (1913) I.L.R. 37 Mad. 55: 24 M.L.J. 429; in appeal, (1916) I.L.R. 39 Mad. 781: 29 M.L.J. 280. See also *Secretary of State for India v. Kasturi Reddi*, (1902) I.L.R. 26 Mad. 268 at p. 279: 12 M.L.J. 453, *per* Bhashyam Iyengar, J.

5. *Kader Zailany v. Secretary of State for India*, (1931) I.L.R. 9 Rang. 375; see also *Shivabhanjun v. Secretary of State for India*, (1904) I.L.R. 23 Bom. 314: 6 Bom. L.R. 65; *Maharani of Nabha v. Madras*, (1944) 1 M.L.J. 399 F.C. in appeal from (1942) 2 M.L.J. 14.

6. *Secretary of State for India v. Ramanath Bhatta*, (1933) 37 C.W.N. 957: 1934 Cal. 128. See also *Uma Parshud v. Secretary of State for India*, I.L.R. 28 Lah. 380: 1937 Lah. 572 (loss of stolen property by embezzlement by the person in charge of a police station); *Rahimbux v. Secretary of State*, 1938 Sind. 6 (improper mode of land acquisition).

7. *Ramaswami v. Secretary of State for India*, 1933 Rang. 113.

servant of Government for the acts of his subordinates. Both in this respect and in the application of the principle of sovereign acts, the case-law is open to the criticism that it has unduly extended the immunity of Government and restricted the rights of the aggrieved subject.

30. **The Government of India Act, 1935.**—Section 176 enacts first, that the Federation may sue or be sued by the name of the Federation of India and a Provincial Government may sue or be sued by the name of the Province; secondly, that they may sue or be sued¹ in relation to their respective affairs in the like cases as the Secretary of State for India in Council might have sued or been sued if this Act had not been passed. These provisions correspond to the first two provisions under the older Acts above set forth. While the first makes an important change in the procedure for suing the Government, the second leaves the vicarious liability of the Government in the position in which it was before. Therefore the principles developed by the previous case-law are unaffected. In lieu of the third provision above set out regarding the discharge of the liabilities incurred by the Secretary of State for India in Council from the public revenues, the present Act enacts that the revenues of the Federation or of a Province shall be charged with any sums required to satisfy any judgment, decree, or award of any Court or arbitral tribunal.²

1. This is "subject to any provisions which may be made by any Act of the Federal or a Provincial Legislature." Therefore the decision in *Moment's case* (I.L.R. 40 Cal. 391 (P.C.); 40 I.A. 48), where an Act of the Burma Legislature affecting the right of action conferred by the Government of India Act was held *ultra vires* is no longer law. See N. Rajagopala Iyengar, *Government of India Act*, p. 209.

2. Ss. 33, 78.

CHAPTER XVII.

BREACH OF STATUTORY DUTY.

1. **Breach of statutory duty.**—A breach of a duty imposed by statute is ordinarily a punishable offence. It may also be actionable by the express terms of the statute or on the principle that an action lies for damage resulting from any indictable offence.¹ This principle accounts for the origin of torts like maintenance which is an offence under certain old statutes in England,² and of the action for special damage resulting from a public nuisance which is an offence at common law.³ In an action for breach of a statutory duty the plaintiff must prove (a) that the statute in question imposes a duty on the defendant; (b) that the duty is towards the plaintiff; (c) that the plaintiff sustained damage as a direct consequence of the defendant committing a breach of duty⁴; and (d) that the damage was such as was contemplated by the statute.

2. **Duty under statute.**—A duty must be distinguished from a power, and an action does not lie for a mere failure to exercise a power or discretion conferred by statute.⁵ But a duty may be implied from a power.⁶ The nature of the duty and the liability caused by its breach would depend on the words of the statute.⁷ A statute may be so framed as to involve a liability to pay for all damage even though due to an act of God,⁸

1. *Corporation of Lyme Regis v. Henley*, (1834) 2 Cl. & F. 331, *per* Park, J.; *Sutton v. Johnstone*, (1786) 1 T.R. 493, *per* Eyre, B.; *Couch v. Steel*, (1854) 3 E. & B. 402, *per* Campbell, C.J.

2. *Neville v. London Express Newspaper*, (1919) A.C. 368, at pp. 380, 392; above, Chap. VIII, para. 20. Another instance was the action for loss of service based on the Statute of Labourers; above, Chap. III, para. 8. 3. Above, Chap. VI, para. 4.

4. As to the quantum or mode of proof, see *Stimson v. Standard Telephones*, (1940) 1 K.B. 342; *Dawson v. Murex Ltd.*, (1942) 1 A.E.R. 483 C.A.

5. *Julius v. Bishop of Oxford*, (1880) 5 A.C. 214; *York and North Midland Ry. Co. v. R.*, (1853) 1 E. & B. 858; *Municipality of Pictou v. Geldert*, (1893) A.C. 524; *Sheppard v. Glossop Corporation*, (1921) 3 K.B. 132; *Wilson v. Halifax Corporation*, (1868) L.R. 3 Ex. 114; *East Suffolk Catchment Board v. Kent*, (1941) A.C. 74; *Bank View Mill Ltd. v. Nelson Corporation*, (1943) 1 K.B. 337 C.A. See *Barnes v. Irwell Valley Water Board*, (1939) 1 K.B. 21; above, Chap. XIV, para. 9.

6. *Geddis v. Proprietors of Bann Reservoir*, (1877) 3 A.C. 430; see also *York and North Midland Ry. Co. v. R.*, above; *Julius v. Bishop of Oxford*, above; Crajes, Statute Law, pp. 251-254.

7. See *Barnes v. Irwell Valley Water Board*, (1939) 1 K.B. 21; above, Chap. XIV, paras. 58 and 60.

8. *River Wear Commissioners v. Adamson*, (1871) L.R. 2 A.C. 743, where the defence of act of God allowed was for liability under the Docks and Piers Clauses Act, 1847 (10 and 11 Vict., c. 27), S. 74 for damage to a harbour or dock by a vessel abandoned in a tempest; but where there was no act of God, the owner of a vessel was held liable without proof of negligence; *G.W. Ry. Co. v. S.S. Mostyn*, (1928) A.C. 57. See also *Wilkinson v. Rea Ltd.*, (1941) 1 K.B. 688 C.A.; *Makin v. L. & N.E. Ry. Co.*, (1943) 1 A.E.R. 645 (C.A.).

the fault of a stranger, or even of the party injured¹; *e.g.*, the Workmen's Compensation Act.² On the other hand a statute may on a proper construction involve no such absolute liability but only one which will admit of some or all these defences or of the defence of inevitable accident.³ Where a statute imposed a duty to fence dangerous machinery and also allowed a defence that it was not reasonably practicable to avoid or prevent a breach of that duty, it was held that where the machinery had to be kept open for a short time for inspection by the engineer and a workman was then injured, the owners of the factory were not liable.⁴ When a statute lays on a person a duty in the form of a peremptory command to do or not to do something, *e.g.*, to fence dangerous machinery,⁵ or to avoid the use of certain explosives in a mine,⁶ he is liable for a breach of it and cannot plead defences like absence of negligence, consent,⁷ common employment⁸ or the fault of an independent contractor.⁹ In such cases the breach of statutory duty is itself proof of negligence or as it has been called, "statutory negligence."¹⁰ Sometimes the breach of a statutory direction may amount only to *prima facie* evidence of negligence and not to conclusive proof of it,¹¹ *e.g.*, failure to comply with the rules of the road.¹² The detailed regulation of dangerous undertakings is a characteristic feature of modern legislation, which thus seeks to standardise the duty in such cases instead of leaving it to the uncertainties of decision by a court of law.¹³ In the case of a ministerial duty, *e.g.*, the duty of a sheriff to execute a warrant of court, or of a polling officer to deliver to an elector a voting paper with the official mark, a breach of it is actionable

1. Below, para. 9.

2. Above, Chap. II, para. 8.

3. Cf. *Phillips v. Britannia Hygienic Laundry Co.*, (1923) 2 K.B. 932.

4. *Coltress Iron Co., Ltd. v. Sharp*, (1938) A.C. 90.

5. *Groves v. Wimborne*, (1898) 2 Q.B. 402; below, para. 4.

6. *David v. Britannic Merthyr Coal Co.*, (1909) 2 K.B. 146; (1910) A.C. 74; see also *Watkins v. Naval Colliery Co.*, (1912) A.C. 693 (to provide lifts in a mine); *Butler v. Fife Coal Co.*, (1912) A.C. 149; *Vincent v. Southern Ry. Co.*, (1927) A.C. 430; *Lochgelly Iron & Coal Co. v. M'Mullan*, (1934) A.C. 1 (to make the roof in a mine secure); *Smith v. Cammel, Laird & Sons*, (1940) A.C. 242 (to provide and maintain a secure staging in a ship-building yard); *Potts v. Reid*, (1943) A.C. 1 (regulation about supporting plank in scaffolding); *Ashworth v. McGuire & Co. Ltd.*, (1944) 1 K.B. 1 C.A. (absolute duty to employ signaller).

7. *Wheeler v. New Marton Board Mills, Ltd.*, (1933) 2 K.B. 669.

8. See cases in notes 5 and 6 above; also *Jones v. Canadian Pacific Ry. Co.*, (1914) 83 L.J.P.C. 13.

9. *Groves v. Wimborne*, above; *Gray v. Pullen*, (1864) 5 B. & S. 970; *Hardaker v. Idle District Council*, (1896) 1 Q.B. 335.

10. *David v. Britannic Merthyr Coal Co.*, (1909) 2 K.B. at p. 164, *per* Fletcher-Moulton, L.J.; *Lochgelly Iron & Coal Co. v. M'Mullan*, (1934) A.C. 1, 29, *per* Lord Wright.

11. *E.g.*, The Maritime Conventions Act, 1911, S. 4; *Blamires v. L. & Y. Ry. Co.*, (1873) L.R. 8 Ex. 283.

12. Above, Chap. XIV, para. 44.

13. Nathan Issacs, *Selected Essays on Torts*, p. 242.

without proof of malice or negligence.¹ Sometimes the language may suggest that the duty is only to take reasonable care. A local authority which was bound to clean a sewer was held not liable for damage due to an obstruction in a sewer of which it was not and could not be aware by the exercise of reasonable care.² In the case of a duty which involves the exercise of a judicial discretion, an action will lie only for a corrupt or malicious but not a negligent performance of it; *e.g.*, certification of a person as a lunatic by the chairman of a board of guardians,³ refusal by a polling officer to accept the vote of a person who was in his opinion not entitled to vote.⁴ The duty imposed by a statute may be abrogated by subsequent legislation. For instance, it was held that the duty of a local authority to light its streets was abrogated by the Lighting Regulations during the present war and a person who during a black-out sustained injury by his car colliding with a street refuge could not recover against the authority.⁵

3. **Duty towards the plaintiff.**—The plaintiff must establish that the duty is towards him, in other words, that an action by him for damages for its breach was contemplated by the statute.⁶ This would depend on the language and purview of the particular statute. There may be two types of statutory duties: (a) a duty imposed for the benefit of particular persons; (b) a duty towards the public generally.

4. **Duty to particular persons.**—The duty may be for the benefit of a particular person or class of persons, *e.g.*, workmen in a certain industry. In such cases that person or any member of the class can sue for its breach unless the contrary appears from the statute.⁷ The fact that the statute provides a penalty or some other specific remedy is not enough to exclude the right of suit for damages.⁸ In *Groves v. Wimborne*,⁹ the statute enacted

1. *Pickering v. James*, (1873) L.R. 8 C.P. 489.

2. *Hammond v. Vestry of Pancras*, (1874) L.R. 9 C.P. 316; see also *Bateman v. Poplar District Board*, (1887) 37 Ch. D. 272; *Stretton's Brewery Co. v. Derby Corporation*, (1894) 1 Ch. 431; *Lambert v. Lowestoft Corporation*, (1901) 1 K.B. 590; *Wilson v. Finsbury Borough Council*, (1908) 1 K.B. 563; *British American Tobacco Co. v. Jones*, (1925) 134 L.T. at p. 407; *Dhawal v. Rangoon Indian Telegraph Association*, (1935) I.L.R. 13 Rang. 369.

3. *Everett v. Griffiths*, (1921) 1 A.C. 681; *Harnett v. Bond*, (1925) A.C. 669; cf. *Harnett v. Fisher*, (1927) 1 K.B. 402; *De Freville v. Dill*, (1928) 138 L.T. 83 (doctor liable for careless certification).

4. *Tuser v. Child*, (1857) 26 L.J. Q.B. 151.

5. *Wodehouse v. Levy*, (1940) 2 K.B. 561 C.A.; above, Chap. VI, para. 16.

6. *Atkinson v. Newcastle and Gateshead Waterworks Co.*, (1877) 2 Ex. D. 441; *Phillips v. Britannia Hygienic Laundry Co.*, (1923) 2 K.B. 832, 843.

7. *Groves v. Wimborne*, (1898) 2 Q.B. 402; for other cases see above, page 512, notes 6 and 7; see also *Simmonds v. Newport Abercarn Coal Co.*, (1921) 1 K.B. 616; *Brambles v. L. & Y. Ry. Co.*, (1873) L.R. 8 Ex. 283.

8. *Ross v. Ruge-Price*, (1876) 1 Ex. D. 269. See *Wood v. L.C.C.*, (1941) 2 K.B. 232 C.A. (kitchen in hospital not a factory and no duty to fence).

9. (1898) 2 Q.B. 402.

that a fine up to £100 might be levied for breach of duty to fence machinery and applied for the benefit of the injured workman or his family. It was held that a right of action would still subsist as the fine might not be adequate for the injury. To this class of cases belongs the much discussed case of *Couch v. Steel*¹ where a shipowner was held liable for failure to keep a supply of medicines on board the ship as required by the Merchant Shipping Act. It was held that the penalty provided by the statute was a remedy only for the public wrong or crime and not for the private injury. A person other than the one towards whom the statute creates the duty cannot have the benefit of it. Thus where a duty to keep sufficient fences was laid on a railway company for the protection of adjoining occupiers, a passenger in a train which was thrown off by collision with a bull which escaped into the railway line from adjoining land could not recover for personal injury merely by proof of a breach of the duty to keep a fence and without proving negligence.² The duty of an owner of a motor car under the Road Traffic Act, 1930, to insure against third party risks is for the protection of persons likely to be injured on the road; therefore he was held liable to a person injured by the negligence of his brother whom he had allowed to use the car without insurance³.

5. **Duty to the public.**—In this class of cases it is more difficult to make out that the plaintiff can have the benefit of the duty so as to sue for damages for its breach. A duty to the whole public is not inconsistent with liability for damage to a member of it; but such liability must appear to be consistent with the scheme of the enactment. The following three rules are deducible from the case-law⁴ and may be of useful guidance on the question of statutory construction.⁵

6. **First rule.**—If the statute only repeats or defines a pre-existing duty under the common law, then there is a right of action unless it is taken away by the statute. Very clear language is required to deprive a subject of the right of action which he has in the King's Courts.⁶ A penalty or other remedy in the statute for the breach of duty will be *prima*

1. (1854) 3 E. & B. 402.

2. *Buxton v. N. E. Ry. Co.*, (1868) L.R. 3 Q.B. 549; see also *Phillips v. Britannia Hygienic Laundry Co.*, (1923) 2 K.B. 823; *Claydon v. Lindsay Parkinson Ltd.*, (1939) 2 K.B. 385. As to cases of damage due to breach of statutory duty to fence, see cases above, Chap. IV, page 95, Notes 1 and 2; also *Manchester Sheffield and Lincolnshire Ry. Co. v. Wallis*, (1854) 14 C.B. 213; *Dickinson v. L. & N. W. Ry. Co.*, (1866) H. & R. 399; *Charman v. S. E. Ry. Co.*, (1888) 21 Q. B. D. 524; *Parkinson v. Garstang Knott End Ry. Co.*, (1910) 1 K.B. 615; *Symons v. Southern Ry. Co.*, (1935) 153 L.T. 98.

3. *McLeod v. Buchanan*, (1940) 2 A.E.R. 179 H.L.

4. E.g., *Wolverhampton Waterworks Co. v. Hawkesford*, (1859) 6 C.B.N.S. 336, *per* Willes, J.

5. On this subject see Thayer, *Selected Essays on Torts*, p. 276.

6. *Per* Scrutton, L.J., in *Lewther v. Clifford*, (1927) 1 K.B. 130, 147.

facie considered as a cumulative and not an exclusive remedy.¹ An action against a bailiff for failing to execute a warrant and causing loss to the decree-holder was allowed on the ground that the liability existed under the common law and was not affected by the provision of a remedy under the County Courts Act.²

7. **Second rule.**—If the statute creates a new duty and does not provide any special remedy, then *prima facie* the ordinary common law remedies of indictment and action for damages are available for damage resulting from a breach of that duty, unless the statute indicates the contrary. The onus is, in such a case, on the person who denies the right of action to show that it is repugnant to the statute.³ In the application of this rule, there is no distinction between a positive act violating a statutory prohibition and a non-feasance or omission to do something enjoined by statute,⁴ *e.g.*, between driving a car beyond the speed limit and failing to provide the lights prescribed by traffic regulations. In *Corporation of Lyme Regis v. Henley*,⁵ an action was allowed against a corporation for failure to repair sea-banks vested in it by Royal Charter. Local authorities have been held liable for damage arising from breaches of statutory duties, *e.g.*, to clean a sewer,⁶ light a street,⁷ to keep water meters⁸ or sewer gratings⁹ in proper condition, or to keep a school in repair.¹⁰ In these cases there was no indication negating a right of action. On the other hand, where such an indication is present, an action would not lie, as in cases arising in England out of omission of highway authorities to perform the duty to repair a highway imposed by the Highways Act. The general observation found in cases of this kind that a public or statutory authority cannot be sued for a non-feasance must be understood with reference to the particular class of cases.

1. *E.g.*, *Brockwell v. Bullock*, (1889) 22 Q.B.D. 567; *Morris v. Loughborough Corporation*, (1908) 1 K.B. 205.

2. *Watson v. White*, (1896) 2 Q.B. 9; see *Domino v. Grimsdall*, (1937) 100 L.J.K.B. 386 (action allowed against a bailiff for releasing attached goods in contravention of s. 49 of the County Courts Act, 1888). Cf. *Kambhotla v. Ashraf Hussain*, (1925) 49 M.L.J. 450 (no action against a police officer for refusing to receive a complaint).

3. *Clowes v. Staffordshire Potteries Waterworks Co.*, (1872) L.R. 8 Ch. 125.

4. *Per Atkin, L.J.*, in *Phillips v. Britannia Hygienic Laundry Co.*, (1923) 2 K.B. 832 at pp. 841, 842; see also 27 Har. L.R. 317. 5. (1834) 2 Cl. & F. 331.

6. *Baton v. Portslade Urban Council*, (1900) 2 Q.B. 588.

7. *Carpenter v. Finsbury Borough Council*, (1920) 2 K.B. 195; *Sheppard v. Glossop Corporation*, (1921) 3 K.B. 132.

8. *Blackmore v. Vestry of Mile End Old Town*, (1882) 9 Q.B.D. 45.

9. *White v. Hindley Local Board*, (1875) L.R. 10 Q.B. 219; *Papworth v. Battersea Corporation*, (1914) 2 K.B. 89; *Corporation of Raleigh v. Williams*, (1893) A.C. 540 where an action for non-repair was expressly conferred by statute.

10. *Ching v. Surrey County Council*, (1910) 1 K.B. 736.

8. **Third Rule.**—If the statute creates a new duty and provides a special remedy, such remedy *prima facie* excludes a right of action¹. It is, however, open to the plaintiff to show that it does not and is only cumulative to the ordinary legal remedies.² But as the duty is new and but for the statute he would have no cause of action under the law, the presumption raised by the provision of a special remedy is generally strong in this class of cases. In fact courts have raised it even where the remedy is not compensatory at all but is only a penalty, or fine which goes to the Crown and not to the injured party. There are many well-known illustrations of this rule.³ In England, actions have been held not to lie against local authorities for damage due to their failure to perform duties under the Highways and Public Health Acts to repair a highway,⁴ or to provide a proper system of drainage.⁵ The *ratio decidendi* of these cases has already been explained.⁶ If, however, there is an improper performance of such duties, the case falls under the first rule aforesaid and an action will lie for damage arising from a misfeasance.⁷ In *Atkinson v. Newcastle and Gateshead Waterworks Co.*,⁸ a private Act of Parliament by which a water-works company was incorporated imposed a duty on the undertakers to keep charged with a certain pressure of water all the pipes to which fire plugs were attached. The plaintiff alleged that this was not done and he suffered loss by reason of the insufficiency of water during a

1. *Per* Lord Tenterden in *Bishop of Rochester v. Bridges*, (1831) 1 B. & Ad. 847; *Wolverhampton Waterworks v. Hawkesford*, (1859) 6 C.B.N.S. 336; *Witham Outfall Board v. Boston Corporation*, (1926) 136 L.T. 756. (Also a right of action for an injunction; *Institute of Patent Agents v. Lockwood*, (1894) A.C. 347; but not at the instance of the A.G. to prevent a public injury; *A. G. v. Sharp*, (1931) 1 Ch. 121, 128; *A. G. v. Premier Line Ltd.*, (1931) 172 L.T. (Jour.) 469; 30 L.G.R. 126.

2. *Per* Atkin, L.J., in *Phillips v. Britannia Hygienic Laundry Co.*, (1923) 2 K.B. 832; *R. v. Poplar Borough Council*, (1922) 1 K.B. 72; *R. v. Manchester Corporation*, (1911) 1 K.B. 560; *Monk v. Wareby*, (1935) 1 K.B. 75; *Square v. Model Farm Dairies Ltd.*, (1939) 2 K.B. 365 C.A.; *McLeod v. Buchanan*, (1940) 2 A.E.R. 179 H.L.; *London Armoury Co. v. Ever Ready Co.*, (1941) 1 A.E.R. 364.

3. See also *Johnston and Toronto Type Foundry Co. v. Consumers' Gas Co.*, (1898) A.C. 447; *Vallance v. Falle*, (1884) 13 Q.B.D. 109; *Heath's Garage v. Hodges*, (1916) 2 K.B. 370.

4. *Cowley v. Newmarket Local Board*, (1892) A.C. 345; above, Chap. VI, para. 15.

5. *Glossop v. Heston and Isleworth Local Board*, (1879) 12 Ch. D. 102; *Saunders v. Holborn District Board*, (1895) 1 Q.B. 64; cf. *R. v. Marshland Smeeth and Fen District Commissioners*, (1920) 1 K.B. 155, *per* McCardie, J.; *Bohan v. Clements*, (1920) 2 Ir. R. 117; *Davis v. Bromley Corporation*, (1908) 1 K.B. 170 (mandamus was the only remedy against a Municipal Council refusing to approve building plans, though maliciously); *Municipal Board of Benares v. Behari Lal*, (1926) 1 L.R. 48 All. 500; *Municipal Board, Bareilly v. Abdul Asis Khan*, (1934) 1 L.R. 57 All. 219; 1934 All. 795. See above, Chap. VI, para. 23, page, 178, note 8.

6. Above, Chap. VI, para. 16.

7. *Hawthorn Corporation v. Kannuluik*, (1906) A.C. 105; for other cases, see above, Chap. VI, para. 16.

8. (1877) 2 Ex. D. 441; see *Scammell v. Hurley*, (1929) 1 K.B. 419, 435 (failure to supply light during the general strike in 1926); *Clegg Parkinson & Co. v. Earby Gas Co.*, (1896) 1 Q.B. 562.

fire on his premises. His action was dismissed on the ground that the language and purview of the statute indicated that the penalty provided by it was the only remedy for breach of duty. If a right of action were allowed, the water company would become insurers of the whole town against fire and an obligation of such a vague and oppressive character could not be presumed to have been made a part of the legislative bargain entered into by the company. In this case¹ doubts were thrown on the correctness of the decision in *Couch v. Steel*² and the broad rule laid down therein that whenever there is a statutory duty, an action lies for damage resulting from its breach. It was, however, admitted that the enactment in that case was of a wholly different kind and there was no necessary conflict between the two cases. *Couch v. Steel* is still good law³ and governs cases where a duty is imposed for the benefit of a particular person or class of persons. In *Dawson v. Bingley Urban District Council*,⁴ an action was allowed for failure to perform the duty under S. 66 of the Public Health Act, 1875, "to provide fire plugs and other necessary works for securing an efficient supply of water in case of fire, and to paint or mark the buildings in the street near fire plugs to denote the situation thereof." The plaintiff alleged that during a fire it took time to discover a fire plug buried under the surface as the indication plate on the wall was not in a straight line from it but was a few feet away, and therefore he sustained loss by the delay in putting out the fire. The defendants were held liable as their conduct was not a mere non-feasance but a misfeasance, *i.e.*, a breach of the common law duty to use due care. In *Barnes v. Irwell Valley Water Board*⁵ the statutory duty of a water board to supply pure and wholesome water in their main pipes was held only to be cumulative to their common law duty to use reasonable care that the water supplied to the customers is pure and wholesome. The decision in each case would depend on the language and intendment of the particular statute. In *Arbon v. Anderson*⁶ a person detained in prison under the Defence (General) Regulations (Reg. 18-B) sued the Home Secretary and the prison officials for damages on the ground that the conditions in which he was detained were contrary to the instructions issued

1. (1877) 2 Ex. D. at pp. 448, 449; see also *per* Lord Cairns in *Ward v. Hobbs*, (1878) 4 A.C. 13, 23; *Cowley v. Newmarket Local Board*, (1892) A.C. 345.

2. (1854) 3 E. & B. 402.

3. *Simmonds v. Newport Abercarn Coal Co.*, (1921) 1 K.B. 616 at p. 624; see also *Hemmings v. Stoke Poges Golf Club*, (1920) 1 K.B. 720 at p. 731. In *R. v. Marshland Smeth & Fen District Commissioners*, (1919) 17 L.G.R. 678, cited by Robinson, Public Authorities, at p. 156, McCardie, J., observed that all these cases require to be considered by the House of Lords.

4. (1911) 2 K.B. 149. For two illustrations on either side of the line, see *Phillips v. Britannia Hygienic Laundry Co.*, (1923) 2 K.B. 832; and *Monk v. Wareby*, (1935) 1 K.B. 75.

5. (1939) 1 K.B. 21; see also *Read v. Croydon Corporation*, (1933) 4 A.E.R. 631; cf., *Square v. Model Farm Dairies*, (1939) 2 K.B. 365.

6. (1943) 1 K.B. 252.

in 1940 by the Home Secretary in a White Paper and also to the Rules issued under the Prison Act, 1933. The ground of complaint was in regard to facilities for association with other detenus and for organised games. Goddard L.J., in dismissing the action observed that the breach of any statutory rule even if made out in the case would not furnish a cause of action to a prisoner. "While I do not think it necessary to decide whether if a person sustains personal injury through an act of negligence of a prison officer, he can bring an action, it seems to me impossible to say that, if he can prove some departure from the prison rules which caused him inconvenience or detriment, he can maintain an action. It would be fatal to all discipline in prisons if governors and wardens had to perform their duty always with the fear of an action before their eyes, if they, in any way, deviated from the prison rules." The safeguards against abuse were, the learned judge proceeded to say, appeals to the Visiting Committee and finally to the Secretary of State and these were the only remedies.

9. **Damage caused directly by breach of duty.**—The plaintiff must show that he has sustained special damage; else he cannot sue for damages for breach of statutory duty. This is, however, not necessary where the breach of duty amounts also to an invasion of a personal right to property or other benefit¹. Where an employer was bound to pay the weekly wages to his workmen and deliver to each of them a statement to explain how the amount paid to him was arrived at, it was held that the latter duty could be enforced without proof of damage and nominal damages might be awarded for its breach.² The damage must be the direct consequence of the breach of duty.³ The driver of a motor car may at the moment of a collision be committing a crime by driving without a licence, number-plate or rear lights; but will not on that account be liable for damage which is unconnected with such conduct. The plaintiff's contributory negligence is a defence on the ground that it breaks the causal relation between his injury and the defendant's breach of duty.⁴ If the phrase 'contributory negligence' used in an action for negligence is misleading, it is even more so in the present context because it suggests original negligence on the part of

1. *Chamberlain v. Chester and Birkenhead Ry. Co.*, (1848) 1 Ex. 870, 876; *Lloyd v. Burroughs*, (1868) L.R. 4 Ex. 63 (right to money); *Ashby v. White*, (1701) 2 Ld. Raym. 938; *Pickering v. James*, (1873) L.R. 8 C.P. 489 (right to vote).

2. *Simmonds v. Newport Abercarn Coal Co.*, (1921) 1 K.B. 616 at p. 631, *per* Atkin, L.J.

3. *E.g.*, *Price v. Webb*, (1913) 2 K.B. 367 (failure of employer to return insurance cards to employee not the direct cause of latter's inability to obtain employment); *Daniels v. Vaux*, (1938) 2 A.E.R. 271 (defendant allowing her son to use her car without insurance not the direct cause of the plaintiff's failure to recover damages against the son who died as plaintiff could have sued the son before the latter's death).

4. *Carwell v. Powell etc., Collieries*, (1940) A.C. 152, 164, 165; *Lewis v. Denye*, (1940) A.C. 921; *Wood v. L. C. C.*, (1941) 2 K.B. 232 C.A.; *Proctor v. Johnson*, (1943) 1 A. E. R. 565 C.A.; *Sparks v. Edward Ash Ltd.*, (1943) 1 K.B. 223 C.A.

the defendant. But a statutory duty may be absolute or independent of any standard of care. The phrase has, however, been used as a matter of convenience to mean what it means in the law of negligence, *viz.*, that the conduct of the plaintiff is the direct cause of his own injury. For instance, a person cannot complain of damage due to his driving in daylight into a heap of stones forming an obstruction in a highway.¹ While contributory negligence is a defence, the mere breach of statutory rule or regulation by the plaintiff will not *per se* be a defence.² In deciding whether the negligence of the party injured or killed is the direct or effective cause of his injury or death, the standard of care to be applied in cases of dangerous employments in which the legislature has provided safeguards and imposed duties on employers or other persons in a position to take protective precautions would be sometimes special and rather different from those in the ordinary cases of contributory negligence. The policy of the statutory protection would be nullified if every act of carelessness or inattention on the part of the workman were held to debar him from recovering. Such conduct would not in law be regarded as the dominant or effective cause of the injury but the breach of statutory duty would be that cause.³ In particular cases the duty may be such as to involve a liability in spite of the negligence of the party injured.⁴ For instance, the use of dangerous machinery may require precautions designed to protect the careless as well as the careful workman.⁵ It is no excuse for a person bound by statutory duty, *e.g.*, the owner of a factory being under a duty to provide safe apparatus or plant, to plead that the damage was caused not by a breach of duty on his part but by the fault of one of his employees who allowed unsafe plant to be used.⁶

ILLUSTRATIONS.

East Suffolk Rivers Catchment Board v. Kent: The defendants, the E. S. R. Catchment Board, were constituted under the Land Drainage Act, 1930 and had a power under the Act to repair any watercourse or drainage work and the walls or banks thereof. On account of an exceptionally high flood in a river in the area there were breaches in a wall adjoining and guarding the plaintiff's property. The Board attempted to repair the

1. *Butterly v. Drogheda Corporation*, (1907) 2 Ir. R. 134; *Torrance v. Ilford D.C.*, (1909) 73 J.P. 225. 2. 1940 A.C. 921, 929.

3. Above, Chap. XIV, para. 79; *Proctor v. Johnson* (1943) 1 A.E.R. at p. 511.

4. Above, para. 2. See *Flower v. Ebbw Vale Steel, etc., Co., Ltd.*, (1936) A.C. 206, 214, 216; *R. v. Southern Canada Power Co.*, (1937) 3 A.E.R. 923; *Crane v. Meyer-Dumore, etc., Ltd.*, (1936) 2 A.E.R. 1150; *Murray v. Schwachman*, (1938) 1 K.B. 130. Cf. *Bailey v. Geddes*, (1939) 1 K.B. 156; *Chisolm v. London Passenger Transport Board*, (1939) 1 K.B. 426, 448. As to consent being a defence, see below, Chap. XVIII, para. 25.

5. *Carey v. Ocean Coal Co.*, (1938) 1 K.B. 365; *Vowles v. Armstrong-Siddley Ltd.*, (1938) 4 A.E.R. 796 C.A.; *Lotinga v. N. E. Marine Engineering Co.*, (1941) 2 K.B. 399; *Hutchinson v. L. & N. E. Ry. Co.*, (1942) 1 K.B. 48 C.A.; *Wraith v. Flexile Metal Co. Ltd.*, (1943) 1 K.B. 24. 6. *Dawson v. Murex Ltd.*, (1942) 1 A.E.R. 483 C.A.

7. (1941) A.C. 74.

wall but not well enough or so efficiently as to prevent damage to plaintiff's property. An action by the plaintiff was disallowed by the House of Lords on the ground, first, that the Board had a power but no obligation to repair and secondly, that the damage was not caused by their inefficient mode of doing the work but by natural forces which they were not bound to counteract. If, however, the damage was due to their negligent manner of doing the work which they undertook, though not obliged, to do, it would be another matter.

*Summers v. Salford Corporation*¹: The plaintiff was a tenant of a house of the defendant Corporation which being governed by the Housing Act, 1936, the defendant was under a statutory duty to keep in all respects reasonably fit for human habitation. On account of the breaking of a sash cord of a window which the defendant, though notified, had failed to set right, another sash cord broke while the plaintiff was cleaning the window and injured her. She was held entitled to recover. Though the broken sash cord made the breaking of another sash cord connected with it probable and the handling of the window risky, she was entitled to use the room and clean the window. Her injury followed in the ordinary course of things from the broken sash cord and was therefore the direct consequence of defendant's neglect.

*Carwell v. Powell Duffryn Associated Collieries Ltd.*²: The defendants, owners of a colliery, had committed a breach of duty under the Coal Mines Act, 1911, to fence securely every flywheel and all exposed and dangerous parts of the machinery. A workman was killed by being caught between a belt and a roller. In an action by his representatives under the Fatal Accidents Act, it was held that the defendants were liable. The House of Lords ruled that contributory negligence is a defence to such an action as in an action for negligence but held that in that case there was no evidence of contributory negligence.

*Lewis v. Denye*³: In an action by a workman, a boy of sixteen and a half years of age, injured while working at a circular saw, the House of Lords held that though the defendant, employer, was guilty of breach of duty to have the saw securely fenced, the injury was really due to the plaintiff's negligence in failing to use a pushstick supplied to him for pushing through the wood in the saw.

10. Damage contemplated by statute.—The damage complained of must be such as was contemplated by the statute. In *Gorris v. Scott*,⁴ shipowners were required by certain regulations to provide separate pens of certain dimensions for cattle and buttens or footholds in the floor of the pens. It was held that a person whose cattle on board ship had been washed overboard by reason of the shipowner's failure to comply with these regulations could not sue for the loss as their object was only to prevent overcrowding and infection. In *Ward v. Hobbs*,⁵ a statute prohibited the sending of animals with contagious diseases to a market

1. (1943) 1 A. E. R. 68 C. A.

2. (1940) A. C. 152. See *Fowler v. Yorkshire Electric Power Co. Ltd.*, (1939) 1 A. E. R. 407 (if it is not possible to fence, duty is not to use the machine); *Wood v. London C. C.*, (1941) 2 K. B. 642 C. A. (kitchen in a mental hospital is a factory to which the above provision applies); cf. *Weston v. L. C. C.*, (1941) 1 A. E. R. 555 (K. B. D.) (technical school, not a factory).

3. (1940) A. C. 921.

4. (1874) L. R. 9 Ex. 125; see also *Buxton v. N. E. Ry. Co.*, (1868) L. R. 3 Q. B. 549.

5. (1878) 4 A. C. 13.

for sale. It was held that this was in the interest of other animals sent there and that a purchaser who bought animals and took them home cannot complain of damage to his animals.

11. **Remedy.**—The ordinary civil remedy is an action for damages. The criminal remedy of indictment is also available unless it is excluded by statute.¹ An action for injunction will lie to avert damage arising from a breach of duty.² An action for mandamus is the remedy for compelling the performance of a public duty.³ Where a statutory duty amounts to conferring a personal right, a suit for declaration will also lie.⁴ A person who pursues a remedy provided by statute must conform to its requirements; for instance, if it lies in one court, he cannot go to another.⁵

1. *R. v. Hall*, (1891) 1 Q. B. 747, 753, 767; for indictment of a corporation, see *R. v. Tyler*, (1891) 2 Q. B. 588, 592.

2. *A. G. v. Birmingham Corporation*, (1912) A. C. 738. An injunction can be asked for, though the statute has provided a penalty for a past breach of duty; *Cooper v. Whittingham*, (1880) 15 Ch. D. 501; *Carlton Illustrators v. Coleman & Co.*, (1911) 1 K. B. 771; *Stevens v. Chown*, (1901) 1 Ch. 894; *A. G. v. Wimbledon House Estate Co.*, (1904) 2 Ch. 34.

3. Specific Relief Act, S. 45; *Sm. Lakshmimoni Dasi, In re*, I. L. R. (1941) 1 Cal. 16; 1941 Cal. 391; *Hirandranath v. Corporation of Calcutta*, I. L. R. (1941) 1 Cal. 435; 1941 Cal. 386; *A. C. Mahomed v. Corporation of Calcutta*, 45 C. W. N. 408; cf. *Commissioner of Income-Tax v. Bombay Trust Corp. Ltd.*, I. L. R. 60 Bom. 900; 1936 P.C. 900; it is otherwise if the remedy is excluded by statute; *Pasmora v. Oswaldthistle U. D. C.*, (1898) A. C. 387. S. 55 (mandatory injunction); see *Kashinath v. Municipal Board, Agra*, I. L. R. (1939) All. 337; 1939 All. 375 (no injunction to improve water supply arrangements); *Fakir Mohamed v. Municipal Commissioner of Bombay*, I. L. R. (1937) Bom. 774; 1937 Bom. 395 (no mandamus to enforce a discretionary power to issue a license); see also *Cawash Bomanji v. Prafulla*, 1941 Nag. 364. See also *A. G. v. Staffordshire C. C.*, (1905) 1 Ch. 336; *Peebles v. Oswaldthistle U. D. C.*, (1897) 1 Q. B. 384.

4. *Simmonds v. Newport Abercarn Coal Co.*, (1921) 1 K. B. 616.

5. *Barracough v. Brown*, (1897) A. C. 615.

CHAPTER XVIII.

GENERAL DEFENCES.

1. **General defences.**—We now proceed to discuss general defences to actions for torts. Special defences applicable to particular torts have already been considered, *e.g.*, privilege in an action for defamation, prescription in an action for nuisance. Many of the important general defences are defined by the Indian Penal Code under the title of 'General Exceptions.'¹ The defences here considered are the following: (i) Authority of public officers; (ii) Judicial authority; (iii) Quasi-judicial authority; (iv) Parental and quasi-parental authority; (v) Statutory authority; (vi) Necessity; (vii) Consent; (viii) Defence of person or property. Before considering these defences, it may be useful to examine how far the following are also defences, *viz.*, (a) inevitable accident, (b) mistake, (c) exercise of common rights, and (d) plaintiff being a wrongdoer.

2. **Inevitable accident.**—The plea of inevitable accident is usually spoken of as a defence² but is, strictly speaking, not a defence but only a denial of liability. For instance, in an action for bodily harm the plaintiff has ordinarily to prove intent or negligence of the defendant; and if he fails to do so, his injury may be said to be an inevitable accident. In cases of absolute liability like *Rylands v. Fletcher*, inevitable accident is no excuse unless it assumes the form of an act of God.³

3. **Mistake.**—Mistake of law is generally no defence to civil or criminal liability. Mistake of fact is a general defence under the Indian Penal Code⁴ but not to an action in tort. For instance, an officer who executes a warrant of arrest against the wrong man by mistake is not guilty of a crime,⁵ but he will be liable in an action for false imprisonment.⁶ Mistake would be an excuse only in those exceptional cases where an unlawful intent or motive is an essential ingredient in liability, *e.g.*, a mistaken but honest statement on a privileged occasion, a criminal prosecution instituted by mistake. In other cases even an honest or inevitable mistake is no defence, *e.g.*, trespass to person or property, conversion of goods as in *Hollins v. Fowler*,⁷ defamation as in *Hulton v. Jones*.⁸

1. Chap. IV.

2. Pollack, Torts, Chap. IV.

3. Above, Chap. VI, para. 80 and Chap. XV, para. 7.

4. S.L. 76, 79.

5. *E. v. Gopalrao*, (1923) 26 Bom. L.R. 138; 1924 Bom. 333.

6. Above, Chap. II, para. 15.

7. (1875) L.R. 7 H.L. 757, above, Chap. V, para. 42.

8. (1910) A.C. 20; above, Chap. VII, para. 17 and 18.

4. **Exercise of common rights.**—We find a defence under this title in Sir Frederick Pollock's Law of Torts.¹ This, like inevitable accident, is really not a defence but a denial of a breach of duty or a violation of right, as where the defendant builds on his land and shuts off light to a new house of his neighbour, or opens a new shop and ruins an older rival. The defence is necessary on the assumption that there is a general rule of liability for intentional harm. The difficulties in the way of accepting such a rule have already been noticed.²

5. **Plaintiff being a wrongdoer.**—This circumstance is not by itself a defence³ but may be material for other defences recognised by the law. It may be evidence of the plaintiff's consent⁴ or contributory negligence.⁵ It may show the absence of a breach of duty, *e.g.*, where a trespasser is hurt by a vicious dog in the premises.⁶ It may affect the causal relation between the defendant's breach of duty and the damage suffered by the plaintiff as in *Weld-Blundell's* case⁷ and *Howard v. Odhams Press, Ltd.*⁸ In the former case Lord Dunedin suggested an alternative ground of decision, *viz.*, that "no man can claim damages when the root of the damage which he claims is his own wrong."⁹ He observed that this was the underlying principle of the decision in *Neville v. London Express Newspaper*¹⁰ and of the doctrine in *Merryweather v. Nixon*,¹¹ denying contribution between joint wrongdoers. In *Howard v. Odhams Press, Ltd.*,¹² Greene, L.J., observed that this would be a special substantive rule of law different from the principle of causation on which Lords Sumner and Wrenbury rested their decision and that if he could express his own preference their ground of decision appeared to be more consonant with the decision in *Neville's* case than Lord Dunedin's. If the plaintiff is a wrongdoer in the sense that he is a party to a manifestly unlawful or immoral act and relies on it as part of his cause of action, his action would fail on grounds of public policy. An instance has already been referred to, *viz.*, where a woman who agreed to live in immoral association with a married man on the faith of a false

1. p. 115.

2. Above, Chap. XIII. para. 4.

3. In Massachusetts courts held formerly that a person who violated the laws against travelling on a Sunday could not recover for injury during such travel; but this has been negatived by statute in that state and has not been followed outside it. Pollock, Torts, p. 138-139; Burdick, Torts, p. 102. In that state an owner or driver of an unregistered automobile cannot, it seems, sue another for injury, and is a sort of outlaw; and no more a lawful traveller than a runaway horse. 66 U.S.L.R. 397.

4. Below, paras. 24-28.

5. Above, Chap. XIV, para. 77.

6. Above, Chap. XIV, para. 28. See also *Hillen v. I. C. I., (Alkali), Ltd.*, (1934) 1 K.B. 455; (1936) A.C. 65.

7. (1920) A.C. 956; above, Chap. VII, para. 89 and Chap. XIV, para. 76.

8. (1938) 1 K.B. 1; above, Chap. XIV, para. 76.

9. (1920) A.C. at p. 976.

10. (1919) A.C. 368; above, Chap. VIII, para. 20.

11. Below, Chap. XIX, para. 27.

12. (1938) 1 K.B. at pp. 47, 48.

representation made by him was not allowed to sue him for deceit.¹ Apart from the defences known to the law and set out above, the plaintiff being a wrongdoer is by itself no defence and even a wrongdoer may recover, *e.g.*, a trespasser to whom an occupier of premises uses needless force.

6. Authority of public officers.—Under this head, the position of the following persons may be considered: first, executive, and second, military and naval officers of the Crown. The authority of executive officers in various spheres of governmental activity is nowadays governed in most part by statute law. There is therefore rarely any need at the present day for exploring the field of constitutional law for ascertaining their inherent powers.² With regard to certain matters these powers are well-settled. They originally formed part of the royal prerogative and are now exercised in a constitutional monarchy by the ministers and their subordinates. They may be considered under the following four categories.

7. Defence of the realm against external aggression and suppression of internal disorder.—Acts done in furtherance of this vital concern of the State are excused on the ground of necessity. The Government can impress men for service,³ seize property⁴ for bulwarks, aerodromes and other military requirements, declare martial law,⁵ commandeer ships⁶ or goods,⁷ arrest persons suspected of helping the enemy or otherwise dangerous by being at large,⁸ restrain the movements of persons, and do other acts necessary for the purposes aforesaid. The powers of executive and military officers in these matters have been regulated by the Defence of the Realm Acts passed during the last war and by similar legislation during the present war. Besides, such officers are usually protected by Indemnity Acts passed after a war or rebellion, from suits or other proceedings in respect of injuries caused by them during the progress of the war or rebellion.⁹ In the absence of such legislation, courts of law are not

1. *Siveyer v. Allison*, (1935) 2 K.B. 403; above, Chap. IX. para. 14. Cf. *Burrows v. Rhodes*, (1899) 1 Q.B. 816 (where the defence failed as the act was not manifestly unlawful).

2. For instances where the question became material, see *R. v. Halliday*, (1917) A.C. 266; *A. G. v. De Keyser's Royal Hotel*, (1920) A.C. 508.

3. Above, Chap. II, para. 21.

4. *In re a Petition of Right*, (1915) 3 K.B. 649; the owner of property is entitled to compensation; *A. G. v. De Keyser's Hotel*, (1920) A.C. 508. As to selection of a site for a military camp, see *Hawley v. Seale*, (1877) 6 Cu. D. 521, 528.

5. *R. v. Channappa*, (1930) 32 Bom. L.R. 1613; 1931 Bom. 57.

6. *Crown of Leon v. Admiralty Commissioners*, (1921) 1 K.B. 595.

7. *Rup Lal v. Secretary of State for India*, (1925) I.L.R. 5 Pat. 205 (impressing carts for hire).

8. *Ex parte Marais*, (1902) A.C. 109; *R. v. Halliday*, (1917) A.C. 266; *In re Anir Khan*, (1870) 6 B.L.R. 392.

9. *Phillips v. Eyre*, (1870) L.R. 6 Q.B. 1 (Act passed after the Jamaica riots). Above, Chap. II, para. 25 (a).

debarred, when normal conditions are restored, from examining the grounds of necessity that existed for inflicting the injuries complained of during a war or rebellion.¹ Therefore the executive has no prerogative overriding the common law. But courts would naturally allow a large margin of discretion to the officers concerned who had to fight a war or rebellion and would not presume to sit in judgment over their conduct of military operations. Besides the power to suppress a riot or rebellion, magistrates, police and military officers have the power to disperse unlawful assemblies by force and thus avert danger to the public peace².

8. Transactions with independent States and subjects of such States.—In the *Tanjore Raj* case,³ the Privy Council held that the annexation of the Raj by the East India Company could not be questioned in a court of law. Lord Kingsdown observed:

“The transactions of independent States between each other are governed by other laws than those which municipal courts administer. Such courts have neither the means of doing what is right, nor the power of enforcing any decision which they may make.”

Similarly a court of law has no power to entertain an action in respect of injury arising from Government's declaration of war, peace, or blockade,⁴ treaties of peace⁵ or of commerce, or seizure⁶ or cession⁷ of foreign territory. A subject of a foreign State who is not residing in British territory at the time cannot also complain of any injury to him done by or under the authority of the British Government. In *Buron v. Denman*,⁸ the defendant, the commander of a British man-of-war, had destroyed certain property of a slave-trader on the west coast of Africa and his act was approved by the British Government. It was held no action lay against the defendant. Similarly the Government has authority to exclude undesirable aliens from its borders.⁹ Where, however, an injury is inflicted on an alien who is also a British subject at the time, he can complain of it in the British

1. See on this subject Dicey, *Law of the Constitution*, p. 539; Moore, *Act of State*, p. 48; Finlason's *Review of the authorities as to repression of riot or rebellion*, 1868. During a war or a state of martial law, courts of law have no right to question acts of the military authorities; *Ex parte Marais*, (1902) A.C. 109[†]; as to this case, see Dicey, *Law of the Constitution*, p. 546; Dodd, 18 L. Q. R. p. 143.

2. S. 132, Crl. Pr. Code, Chap. IX. Acts done in good faith are not offences.

3. *Secretary of State for India v. Kamatchee Boye Saheba*, (1859) 13 Moo. P.C. 22, 75; see also *Duke of Brunswick v. Hanover*, (1844) 6 Beav. 1; (1848) 1 H.L.C. 1; as to cases of disputes between independent States in America, see Moore, *Act of State*, p. 107.

4. *Esposito v. Bowden*, (1857) 7 E. & B. 781.

5. *Civilian War Claimants Association, Ltd. v. The King*, (1932) A.C. 14 (a claim to war reparation got from Germany rejected).

6. *Cook v. Sprigg*, (1899) A.C. 572.

7. *Secretary of State for India v. Sardar Rustum Khan*, (1941) A.C. 356.

8. (1848) 2 Ex. 167; see also *Elphinstone v. Bedreechand*, (1830) 2 St. Tr. N.S. 377; *Poll v. Lord Advocate*, (1899) 1 Fraser 823.

9. *Musgrove v. Chun Teong Toy*, (1891) A.C. 272.

courts.¹ *A fortiori*, an injury to a British subject whether resident in England or not, is actionable in the ordinary courts.² In these cases, the wrongdoer cannot rely merely on the warrant or authority of Government as a defence. It is open to a court to examine the legality of the authority claimed by Government or its officers to do the act complained of.³ The following statement of this well-established rule by Lord Atkin is worth setting out here. It was made in a Privy Council case⁴ where a person complained of wrongful deportation by the Governor of Nigeria.

"As the executive he (the Governor) can only act in pursuance of the powers given to him by law. In accordance with British jurisprudence no member of the executive can interfere with the liberty or property of a British subject except on the condition that he can support the legality of his action before a court of justice. And it is the tradition of British justice that judges should not shrink from deciding such issues in the face of the executive."

9. **Disciplinary powers over subordinate officers.**—The Government has the right to employ officers and exercise discipline over them. It can suspend or dismiss them at pleasure.⁵ The Bombay High Court held that a Deputy Collector who was censured in a Government notification for alleged misconduct and dishonesty could not sue the Government for defamation as the right of censure was included in the larger right of dismissal at pleasure.⁶ These powers are however subject to any special provisions under contract or statute.⁷

1. *Johnstone v. Pedlar*, (1931) 2 A.C. 262. See *Commercial Estates Co. of Egypt v. Board of Trade*, (1925) 1 K.B. 271, 290, 297.

2. *Mostyn v. Fabrigs*, (1774) Sm. L.C., Vol. I, p. 642.

3. *Walker v. Baird*, (1892) A.C. 491; *Musgrove v. Pulido*, (1879) 5 A.C. 102; see also *Sprigg v. Sigcau*, (1897) A.C. 233.

4. *Eshugbayi Eleko v. Government of Nigeria*, (1931) A.C. 662, 670.

5. *Shenton v. Smith*, (1895) A.C. 229.

6. *Jehangir v. Secretary of State for India*, (1902) I.L.R. 27 Bom. 189; 5 Bom. L. R. 30; in appeal 6 Bom. L. R. 131; *Ross v. Secretary of State for India*, (1913) I. L. R. 37 Mad. 55; 24 M. L. J. 429; *Ram Das v. Secretary of State for India*, (1912) 18 C. W. N. 106; 116 I. C. 922.

7. *Gould v. Stuart*, (1896) A. C. 575; *Venkata Rao v. Secretary of State*, I. L. R. 1937 Mad. 532 (P. C.); 64 I. A. 55; *Rangachari v. Secretary of State*, I. L. R. 1937 Mad. 517 (P. C.); 64 I. A. 40. See also *Clifford v. The King*, (1933) 66 M. L. J. 639 (P. C.): 1934 P. C. 60; *Venkateswara Aiyar v. Sri Minakshi Devasthanam*, (1935) 69 M. L. J. 206; 1935 Mad. 945; *Secretary of State for India v. D'Attalides*, (1934) I. L. R. 12 Rang. 556; *Jamun v. Secretary of State for India*, (1935) I. L. R. 16 Lah. 1017; *Girdhari Lal v. Secretary of State*, 1937 Lah. 226; *Secretary of State v. Surendra Nath*, I. L. R. (1939) 1 Cal. 46; 1933 Cal. 759; *Province of Bengal v. Bhupendra Kumar*, (1939) 44 C.W.N. 79. The employee of a local board is in a different position; *Municipal Borough, Dhulia v. Ramachandra*, 1938 Bom. 137; *District Council, Amraoti v. Vithal Vinayak*, 1941 Nag. 125; *Gokak Municipality v. Rajaram*, (1940) 42 Bom. I. R. 886; cf. *Malik Narain v. District Board*, 1940 Lah. 71. For a case of a railway employee, see *M. S. M. Ry. Co. v. Ranga Rao*, 1940 Mad. 269.

10. **Apprehension of criminals and suspects.**—The powers of police officers to use force,¹ or to enter private premises,² for stopping a breach of the peace and for the arrest of criminals, suspects and persons committing a breach of the peace has already been considered.

11. **Military and naval officers.**—They have no special privilege or prerogative except what is conferred on them by statute or by the lawful orders of the executive government. Their acts are not justiciable in the ordinary courts while a war is in a state of progress and martial law is prevailing.³ But after the cessation of a war or rebellion, a soldier, like any other citizen, is subject to the courts' jurisdiction; and in an action against him they can examine the existence or extent of necessity pleaded by him as a justification for causing the injury complained of.⁴ As already observed, he usually gets the protection of an Indemnity Act and is saved from an enquiry of this kind.⁵ The maintenance of discipline in the army and navy is regulated by statutes like the Army Acts and Naval Discipline Acts,⁶ which invest superior officers with disciplinary powers and also provide for the constitution of military tribunals for trial and punishment of offenders against military discipline.⁷ A court of law has no jurisdiction to question acts done within such powers but can enquire whether the powers claimed were conferred by statute and whether they were exercised in conformity with it and award damages, if their acts were in excess of their powers.⁸

12. **Act of State.**—This term is used in different senses in different contexts. In the first place, it is used in the sense of an act or transaction which is not justiciable in the ordinary courts, *e.g.*, declaration of war, treaty of peace, annexation or seizure of territory,⁹ injury done by or with

1. Above, Chap II, para. 20. 2. Above, Chap. IV, para. 38.

3. *Ex parte Marais*, (1902) A. C. 109.

4. A leading authority on this subject is *R. v. Pinney*, (1832) 5 C. & P. 254 (Bristol riots of 1831); see Dicey, *Law of the Constitution*, p. 235, *et seq.* and appx. vi. As to a soldier's dual responsibility under the military law to obey his superior's orders even if improper, and under the common law, see Stephen, *Hist. of Crim. Law*, Vol. I, p. 205; *per Willes, J.*, in *Keighly v. Bell*, (1866) 4 F. & F. 763; 1 P. C., ss. 76 and 79.

5. *E.g.*, *Tilonko v. A. G. of Natal*, (1907) A.C. 92, 461.

6. (1866) 29 & 30 Vict., c. 109; (1884) 47 & 48 Vict., c. 39.

7. *R. v. Cuming*, (1887) 19 Q.B.D. 13; *Marks v. Frogley*, (1898) 1 Q.B. 888; *Bradley v. Arthur*, (1825) 4 B. & C. 292, 305.

8. *Warden v. Bailey*, (1811) 4 Taunt. 67; 4 M. & S. 600; see also *Wolfe Tone's case*, 27 St. Tr. 614; *Comyn v. Sabine*, (1737) cited in Sm. L.C., Vol. I, p. 651; *Sutton v. Johnstone*, (1786) 1 T.R. 493; *Dawkins v. Lord Paulet*, (1869) L.R. 5 Q.B. 94; *Fraser v. Balfour*, (1918) 87 L.J.K.B. 1116; *Heddon v. Evans*, (1919) 35 T.L.R. 642, where the authorities are reviewed by McCardie, J. As to the prerogative of the Crown in the administration of the Army and Navy, see *China Navigation Co. v. A. G.*, (1932) 2 K.B. 197.

9. *Secretary of State for India v. Kamatchee Bove Saheba*, (1859) 13 Moo. P.C. 22; *Doss v. Secretary of State for India*, (1875) L.R. 19 Eq. 509; *Salaman v. Secretary of State for India*, (1906) 1 K.B. 513; *Secretary of State v. Sardar Rustum Khan*, (1941) A.C. 356; see above, Chap. XVI, para. 29.

the authority of Government to a foreign subject as in *Buron v. Denman*.¹ To the same category belong acts of sovereignty done by foreign sovereigns, because a British court has no jurisdiction to give relief for injury resulting from them.² Secondly, the term is used also to refer to acts done by Government with reference to its own subjects in the exercise of executive discretion under common law or statute,³ e.g., dismissal of an officer,⁴ deportation of a political offender, declaration of martial law during a riot or rebellion, the disposition of the armed forces of the Crown in time of peace.⁵ In these cases courts of law have jurisdiction to enquire whether the wrong complained of was authorised by the common law or statutory power under colour of which it was done. They therefore differ from acts of state of the former description which are wholly beyond the cognisance of municipal courts. Sir James Fitzjames Stephen used the phrase exclusively in the former sense. Therefore he observed that "as between the sovereign and his subjects there can be no such thing as an act of State."⁶ It is however used frequently in the latter sense also and then it refers to an injury to a British subject which purports to be within the common law or statutory power of Government or its officers.⁷

* 13. **Judicial authority.**—No action lies against a judge in respect of his judicial acts though they are alleged to have been done dishonestly or maliciously.⁸ In England there is a difference in the application of this rule of immunity to superior and inferior courts of justice. No action lies against a judge of a superior court like the High Court of Justice on the ground that he acted beyond his jurisdiction.⁹ This is

1. (1848) 2 Ex. 167; above, para. 8.

2. *The Parlement Belge*, (1880) 5 P.D. 197; *Carr v. Francis Times*, (1902) A.C. 176; see also *Dobree v. Napier*, (1835) 2 Bing. N.C. 781; *Govindan Nair v. Achyuta Menon*, (1915) I.L.R. 39 Mad. 433; 28 M.L.J. 310; *Chaturbuj v. Chunilal*, (1933) I.L.R. 57 Bom. 474 P.C.; 60 I.A. 211. See also *Princess Palayolga v. Weiss*, (1929) 1 K.B. 718.

3. These are sometimes called "matters of State"; Moore, Act of State, p. 32.

4. *Jehangir v. Secretary of State*, (1902) I.L.R. 27 Bom. at p. 214. See also *Girdhari Lal v. Secretary of State*, 1937 Lah. 226.

5. *China Navigation Co., Ltd. v. A. G.*, (1932) 2 K.B. 197.

6. Stephen, History of Criminal Law, Vol. II, p. 65. See *Municipal Corporation of Bombay v. Secretary of State for India*, (1932) 36 Bom. L. R. 563, 604; Mirza, J., observed that in the latter sense it is a misnomer. See also *Venkataranga Iyengar v. Government of Mysore*, 12 Mys. L. J. 328.

7. Acts done by Governors of Colonies by delegation from the Crown under the warrant of commission are called acts of State; *Musgrove v. Pulido*, (1879) 5 A. C. 102, 110. In *Arunachellam v. Venkatachalapatti*, (1919) 1 L. R. 43 Mad. 253 P. C.; 46 I. A. 204, Lord Shaw spoke of the preparation of the Inam Register, i.e., a register prepared in 1864 of lands held under Crown grant in Madras, as a great 'act of State.' For a definition of act of State, see *Srinibash Prasad v. Kesko Prasad*, (1911) 1 L. R. 38 Cal. 754; 15 C. W. N. 475.

8. See above, Chap. II, para. 19 and Chap. VII, para. 42.

9. *Fray v. Blackburn*, (1863) 3 B. & S. 576; *Anderson v. Gorrie*, (1895) 1 Q.B. 668.

because his jurisdiction is unlimited and another judge of the same court cannot review his decision by way of trying an action for damages against him.¹ The only course open in the case of an erroneous decision is an appeal against it as provided by law. But the jurisdiction of a judge of an inferior court like a county court judge or a magistrate is usually limited by the statute which creates the Court and an action lies against the judge on the ground of want of jurisdiction.² But no action lies even against a judge of an inferior court merely on the ground of dishonesty or malice if he has acted within his jurisdiction.³ This immunity would apply to a magistrate,⁴ a military court,⁵ a juror, a coroner,⁶ an official receiver,⁷ but not to officers discharging merely executive or administrative duties.⁸

14. Judicial Officers' Protection Act.—In India a simple and uniform rule is enacted by the Judicial Officers' Protection Act⁹ as follows :—

"No Judge, Magistrate, Justice of the Peace, Collector, or other person acting judicially shall be liable to be sued in any Civil Court for any act done or ordered to be done by him in the discharge of his judicial duty, whether or not within the limits of his

1. *Kemp v. Neville*, (1861) 10 C. B. N. S. 523. Perhaps if the act was so plainly in excess of his powers as to be extra-judicial, he will be liable; *Taaffe v. Downes*, (1812) 3 Moo. P. C. 36 (n).

2. *Deswell v. Impey*, (1823) 1 B. & C. 165, 169. As to whether his knowledge of want of jurisdiction should be proved, see *Calder v. Hall*, (1839) 2 M. I. A. 293; 3 Moo. P. C. 28; cf. *Houlden v. Smith*, (1850) 14 Q. B. 841; *Mayor of London v. Cox*, (1867) L. R. 2 H. L. 239 at p. 263; *Carrait v. Morley*, (1841) 1 Q. B. 18. The question whether the error was one of jurisdiction or an irregularity is not an easy one to decide and the dividing line is not clear in the English case-law. It is however not material for the purposes of the Indian Act and is not discussed here. Cf. *Houlden v. Smith*, (1850) 14 Q. B. 841; *Bow v. Hart*, (1905) 1 K. B. 592; *Mitchell v. Foster*, (1840) 12 A. & E. 472; *Willis v. MacLachlan*, (1876) 1 Ex. D. 376; *Leary v. Patrick*, (1850) 15 Q. B. 266; *Jones v. Gurdon*, (1842) 2 Q. B. 600; *Crepps v. Durden*, (1777) Cowp. 640; *Polley v. Fordham*, (1904) 91 L. T. 525; where actions were allowed for want of jurisdiction; with *Brittain v. Kinnaird*, (1819) 1 B. & B. 432; *Picks v. Carter*, (1825) 3 Bing. 78; *Bott v. Ackroyd*, (1859), 28 L. J. M. C. 207; *Ackerley v. Parkinson*, (1815) 3 M. & S. 411.

3. *Scott v. Stansfield*, (1868) L. R. 3 Ex. 220. As to the distinction in this matter between Courts of Record and other courts, see *Cave v. Mountain*, (1840) 1 M. & G. p. 263; *Limford v. Fitaroy*, (1849) 13 Q. B. 240; *Taylor v. Nesfield*, (1854) 3 E. & B. 724; and the Justices Protection Act, 1848, s. 1; see, however, *Haggard v. Peliclers Freres*, (1892) A. C. 61; per Atkin, L. J., in *Everett v. Griffiths*, (1920) 3 K. B. 163, at p. 205.

4. *Law v. Llewellyn*, (1906) 1 K. B. 487.

5. *Dawkins v. Lord Roteby*, (1875) L. R. 7 H. L. 744.

6. Coroners' Act, (50 & 51 Vict. c. 7); *Garnett v. Ferrand*, (1827) 6 B. & C. 611.

7. *Bottomly v. Brougham*, (1908) 1 K. B. 584; *Burr v. Smith*, (1909) 2 K. B. 306.

8. *Royal Aquarium Society v. Parkinson*, (1892) 1 Q. B. 431.

9. Act XVIII of 1850, s. 1; cf. I.P.C. s. 77; *Sewalram v. Abdul Majid*, I.L.R. (1938) 1 Cal. 581; 1938 Cal. 377; *Hamchandra Roy v. Tarepada*, (1935) 40 C.W.N. 500; above, Chap. VII, para. 42, p. 278, note 2.

jurisdiction: provided that he at the time, in good faith, believed himself to have jurisdiction to do or order the act complained of."

A District Magistrate issuing a warrant for search of a person's premises for fire-arms was held to act judicially.¹ But the commanding officer of a military cantonment who arrested and detained a person whom he suspected to be a lunatic was held not to be protected by the Act.² The belief in jurisdiction must be in good faith, *i.e.*, with due care and caution, and not reckless or in contravention of obvious or well-known rules of law or procedure.³

15. Ministerial officers of court.—The above Act confers an unqualified protection on ministerial officers who execute the lawful warrants of courts of justice.⁴

"And no officer of any court or other person, bound to execute the lawful warrants or orders of any such Judge, Magistrate, Justice of the Peace, Collector or other person acting judicially, shall be liable to be sued in any Civil Court, for the execution of any warrant or order, which he would be bound to execute, if within the jurisdiction of the person issuing the same."

A similar rule prevails in England. A sheriff, bailiff, police officer, gaoler carrying out a warrant or order for arrest, attachment, or search would be protected from action.⁵ But this is on condition that the warrant or order is lawful on the face of it and executed in conformity with law. There is no protection if it is manifestly irregular or illegal,⁶ *e.g.*, a warrant which is not signed or sealed by the magistrate or judge, or if it is executed improperly, *e.g.*, against the wrong man⁷ or property.⁸ It must be observed that the above immunity applies to the execution only of judicial warrants, and not of those issued by executive or administrative officers. In the latter case the protection is conditional on the validity of the order and if it is invalid, the officer issuing and his subordinate executing it are both liable.⁹

1. *Clark v. Brojendra Kishore*, (1912) I.L.R. 39 Cal. 953 (P.C.): 39 I.A. 163; see also *Rohini Kumar v. Niaz Mahammad*, (1943) 77 C.L.J. 93.

2. *Sinclair v. Broughton*, (1882) I.L.R. 9 Cal. 341 P.C.: 9 I.A. 152; above, Chap. II, para. 20; see also *Parankusam v. Stuart*, (1865) 2 M.H.C.R. 396; *Babuchunder v. Brijo Bullub*, (1874) 21 W.R. 391; *Girja Shankar v. Gopalji*, (1905) I.L.R. 30 Bom. 241: 7 Bom. L.R. 951; *Udharam v. Grahams Trading Co.*, 1937 Sind. 281.

3. *Collector of Sea Customs v. Chidambara*, (1876) I.L.R. 1 Mad. 89; see also *Ammiappa v. Mahomed*, (1865) 2 M.H.C.R. 443 (acting with knowledge of excess of jurisdiction); *Raghunatha v. Nathamuni*, (1871) 6 M.H.C.R. 423.

4. S. 1; cf. I.P.C. s. 76. In England see the Constables Protection Act, 1750 (29 Geo., 2, c. 44), s. 6; the Criminal Justice Act, 1925 (15 & 16 Geo. V, c. 86), s. 44; cf. the qualified protection conferred by the County Courts Act, 1888, (51 & 52 Vict., c. 21), s. 52.

5. *Henderson v. Preston*, (1888) 21 Q.B.D. 362 (gaoler); *Demer v. Cook*, (1903) 88 L.T. 629.

6. *Horsfield v. Brown*, (1932) 1 K.B. 355; above, Chap. II, para. 19.

7. *Davies v. Jenkins*, (1843) 11 M. & W. 745 unless the fault was the plaintiff's.

8. *Crosier v. Cundey*, (1827) 6 B. & C. 232; above, Chap. II, para. 19; Chap. VIII, para. 16.

9. See the cases arising out of the issue of general warrants, above, Chap. II, para. 24. See also *Watson v. Bodell*, (1845) 14 M. & W. 57; *Chapman v. Ellesmere (Lord)*, (1932) 2 K.B. 431.

16. **Quasi-judicial authority**—Under this head would fall the authority of persons or associations like a club over its members,¹ a University over its members, officers or graduates, the General Medical Council over registered medical practitioners,² a caste assembly over members of the caste,³ a company over its directors, an arbitrator over the parties who submit their dispute to him, a local authority exercising its statutory powers affecting private rights.⁴ In these cases the authority is analogous to that of a court of justice. It is derived from the voluntary submission of the person complaining and may be regulated by statute or the instrument of foundation of the particular association. Acts done in the exercise of such authority are protected if they conform to the rules of natural justice⁵ and to any other rules prescribed in that regard.⁶ The rules of natural justice would in this context be, for instance, that a person should not be removed from a club or association without due notice and an opportunity to him to show cause,⁷ that the persons who sit in judgment over him should act fairly and *bona fide* and not corruptly⁸ and should not be disqualified by any adverse or hostile interest against him.⁹ An instance of a statutory rule being disregarded is a case where the General

1. *Hopkinson v. Exeter*, (1867) L.R. 5 Eq. 63; *Fisher v. Keane*, (1878) 11 Ch. D. 353; *Labouchere v. Wharnccliffe*, (1879) 13 Ch. D. 346; *Dawkins v. Antrobus*, (1881) 17 Ch. D. 615; *Young v. Ladies Imperial Club*, (1920) 2 K.B. 523; *Mill v. Hawker*, (1875) L.R. 10 Ex. 92; *Gompertz v. Goldingham*, (1886) I.L.R. 9 Mad. 319; *Bishambar Das v. Gobind Das*, (1914) 12 A.L.J. 552; 23 I.C. 301; *Ambalal Sarabai v. Phiroo*, 1939 Bom. 35. As to the right of a member of a club, above, Chap. XII, para. 8.

2. *Allbutt v. G.M.C.*, (1889) 23 Q.B.D. 400; *Partridge v. G.M.C.*, (1890) 25 Q.B.D. 90; *Allinson v. G.M.C.*, (1894) 1 Q.B. 750; as to the Inns of Court, see *R. v. Lincoln's Inn*, (1825) 4 B. & C. 855.

3. *Krishnaswami v. Viraswami*, (1886) I.L.R. 10 Mad. 133; *Jagannath v. Akali*, (1893) I. L. R. 21 Cal. 463; *Appayya v. Pudappa*, (1898) I. L. R. 23 Bom. 122; above, Chap. XII, para. 8.

4. *Errington v. Minister of Health*, (1935) 1 K. B. 249; *Horn v. Minister of Health*, (1937) 1 K. B. 164.

5. As to this phrase, see *MacLean v. The Workers' Union*, (1929) Ch. 602, *per* Maugham, L. J. The plea that the rules were not followed should be specifically taken; *Brunsgaard v. Secretary of State*, 1940 Bom. 294.

6. *Andrews v. Mitchell*, (1905) A.C. 78; *The Empire Antelope*, (1943) P. 79; *Mahomed v. Stewart*, (1920) I.L.R. 47 Cal. 623; *Ramji v. Naranji*, 1935 Bom. 268; 37 Bom. L.R. 261; *Devchand v. Ghanashyam*, 1935 Bom. 361; 37 Bom. L.R. 417; *Haji Abdul Rasak v. Haji Adam Haji*, 1935 Bom. 367; 37 Bom. L. R. 603. Above, Chap. XVII, para. 9.

7. *Cooper v. Wandsworth Board of Works*, (1863) 14 C. B. N. S. 180; *Broadbent v. Rotherham Corporation*, (1917) 2 Ch. 31; *Burn v. Labourers' Union*, (1920) 2 Ch. 364; *Ganapathi v. Bharati*, (1894) I.L.R. 17 Mad. 222; 4 M. L. J. 101 (caste); *Appayya v. Padappa*, (1898) I. L. R. 23 Bom. 122 (caste); *Keshavlal v. Bai Girja*, (1899) I. L. R. 24 Bom. 13; 1 Bom. L.R. 478.

8. For cases of bias, see *Municipal Council of Sydney v. Campbell*, (1925) A.C. 338, 343; *Marshall v. Blackpool Corporation*, (1939) 2 K. B. 339; *District Board, Chittagong v. Sasi Bhushan*, 1936 Cal. 225; *Municipal Board of Taspur v. Abdul*, (1935) 40 C.W.N. 337 (arbitrary assessment). Malice or want of *bona fides* will not be easily presumed and must be strictly proved; *Sukratendra v. Prabhu*, 1930 Mad. 100 (caste), *per* Jackson, J.

9. *Law v. Chartered Institute of Patent Agents*, (1919) 2 Ch. 276.

Medical Council empowered by statute to take disciplinary action against a member "after due inquiry" ordered the erasure of the name of a member who had been found guilty of adultery by the Divorce Court. The Council acted solely on the decision of the Court and refused to hear fresh evidence which the member offered. It was held that there was no due inquiry.¹ If the above conditions are satisfied, an action would not be allowed even if the decision was erroneous or unjust in the opinion of a court of law. If the conditions are not satisfied, the persons concerned are liable.² It was held that no action lay against the Speaker of the House of Commons for expelling Charles Bradlaugh, a member, by force in pursuance of a resolution of the House, because the Houses of Parliament are masters of their own internal affairs in which courts of law cannot interfere.³

17. Parental and quasi-parental authority.—A parent or guardian has authority to chastise or forcibly detain a child or ward.⁴ A school-master has similar authority over the pupil arising from delegation by the latter's parent or guardian.⁵ These persons are protected only if they act in good faith and in a reasonable and moderate manner.⁶ The ideas of reasonableness and propriety that were once prevalent have changed in modern times. Physical chastisement of pupils was allowed formerly⁷ but is now unpopular.⁸ Old methods of dealing with lunatics, like beating them or confining them in dark rooms have gone out of use and cannot be justified by their guardians at the present day. Where there are statutory rules on this matter, failure to conform to them would involve liability.⁹ A husband has no right to physically chastise or imprison his wife.¹⁰

1. *Ex parte Spackman*, (1943) A.C. 627.

2. In some cases the power may be absolute and not qualified by these conditions; *Hayman v. Governors of Rugby School*, (1874) L.R. 18 Eq. 28.

3. *Bradlaugh v. Gossett*, (1884) 12 Q.B.D. 271.

4. Blackstone, Vol. III, p. 42; *In re Agar Ellis*, (1883) 24 Ch.D. 317 at p. 321, Bowen, L.J., suggested that a parent can forcibly stop his daughter aged 16 from eloping to Gretna Green. As to an illegitimate child, see *R. v. Barnardo*, (1891) 1 Q.B. 194.

5. *Cleary v. Both*, (1893) 1 Q.B. 465 (even for acts done outside the school room); *Sankunni v. Swaminatha*, (1922) I.L.R. 45 Mad. 548; 42 M.L.J. 460. For a case of alleged negligence of schoolmaster, see *Camkin v. Bishop*, (1941) 2 A.E.R. 713 C.A.; also *Weston v. L. C. C.*, (1941) 191 L.T. Jour. 159 (alleged neglect of master in a technical school).

6. *Penn v. Ward*, (1835) 2 C.M. & R. 388; *Fitzgerald v. Northcote*, (1865) 4 F. & F. 656, 689; *E. v. Mg. Ba Thung*, (1925) I.L.R. 3 Rang. 659. In the U.S.A. actions between parent and child are not allowed on account of their adverse effects on family peace; 43 Har. L.R. 1063; 44 Har. L.R. 135, 995.

7. For a case of manslaughter, see *R. v. Hopley*, (1860) 2 F. & F. 202.

8. *Ryan v. Fildes*, (1938) 3 A.E.R. 517 (damages awarded against schoolmistress, for giving a box on pupil's ear resulting in deafness).

9. *Hunter v. Johnson*, (1884) 13 Q.B.D. 225; cf. *Mansell v. Griffin*, (1908) 1 K.B. 160; *Sankunni v. Swaminatha*, above, where the rules were not statutory but only departmental.

10. *R. v. Jackson*, (1891) 1 Q.B. 671; *In re Subbia Goundan*, 1936 Mad. 788. As to the effect of the decision in *R. v. Jackson* on the husband's rights, see *Place v. Searle*, (1932) 2 K.B. 497 at pp. 500, 513.

18. **Statutory authority.**—A person cannot complain of a wrong which is authorised by the legislature. The authority may be express. Such cases are rare, and when they occur, the statute usually provides for the payment of compensation to the parties aggrieved. The authority may also be implied. This is a question which depends on the language and purview of each statute. The large and growing volume of legislation in modern times affords instances of various types. The main principles are well-settled and are stated in the following four paragraphs.

19. **Absolute or imperative statutory authority.**—Statutory authority is absolute or imperative when a statute expressly authorises or commands the doing of a certain act. No action will lie in respect of any damage which is a necessary result of the act so authorised.¹ The leading illustrations are cases of nuisances from noise, smoke and sparks, resulting from the running of railways along particular routes authorised by the statute.² The principle has been applied in numerous other cases.³

20. **Conditional or directory statutory authority.**—When a statute merely permits a thing to be done and it can be done without causing injury to another, the authority is conditional or directory. The leading instance is *Metropolitan Asylum District v. Hill*,⁴ where the defendants, a

1. 'Statute' includes rules and orders, under statutory powers, e.g., *National Telephone Co. v. Baker*, (1893) 2 Ch. 186.

2. *R. v. Pease*, (1832) 4 B. & Ad. 30; *Vaughan v. Taff Vale Railway Co.*, (1860) 5 H. & N. 679; cf. *Jones v. Festiniog Ry. Co.*, (1868) L.R. 3 Q. B. 733; *Hammersmith v. Brand*, (1869) L.R. 4 H.L. 171; *Fletcher v. Birkenhead Corporation*, (1907) 1 K. B. 205; but it is otherwise if appliances for preventing the escape of sparks are not used; *Freemantle v. L. & N. W. Ry. Co.*, (1860) 2 F. & F. 340, per Williams, J.; in appeal 10 C.B.N.S. 89; *Secretary of State for India v. Kali Brahma*, (1928) 33 C. W. N. 50: 1928 Cal. 571; *B. B. & C. I. Ry. v. Dwarka Nath*, I.L.R. 58 All. 771; 1936 All. 771.

3. E.g., *Dixon v. Metropolitan Board of Works*, (1881) 7 Q.B.D. 418; *National Telephone Co. v. Baker*, (1893) 2 Ch. 186; *Eastern and South African Telegraph Co. v. Cape Town Tramways Co.*, (1902) A.C. 381; *East Freemantle Corporation v. Annois*, (1902) A.C. 213; *G. C. Ry. v. Hewlett*, (1916) 2 A.C. 511; *Edgington v. Swindon Corporation*, (1939) 1 K.B. 86; *Dormer v. Newcastle Corporation*, (1940) 2 A.E.R. 521 C.A.; *Wodehouse v. Levy*, (1940) 2 K. B. 561 C.A.; *Fox v. Newcastle-upon-Tyne C. C.*, (1941) 1 K.B. 120; *Kishnamoorthi v. Taluq Board of Mayavaram*, (1918) I.L.R. 42 Mad. 331; 36 M.L.J. 372.

4. (1881) L. R. 6 A.C. 193; for instances, see *Rapier v. London Tramways Co.*, (1893) 3 Ch. 508 (location of a stable); *Gas Light and Coke Co. v. Vestry of St. Mary Abbotts*, (1885) 15 Q.B.D. 1 (use of a heavy steam roller); *Biddulph v. Vestry of St. George's Hanoversquare*, (1863) 33 L.J. Ch. 411; *Vernon v. St. James Vestry*, (1880) 16 Ch. D. 449; *Parish v. London Corporation*, (1901) 67 J.P. 55; *Mudge v. Penge, U. D. C.*, (1917) 86 L.J. Ch. 126 (location of public urinals); *West v. Bristol Tramways*, (1908) 2 K.B. 14 (use of creosoted wood for paving streets); *Dell v. Chesham, U.D.C.* (1921) 3 K. B. 427 (use of tar on roads); *Powell v. Fall*, (1880) 5 Q.B.D. 597; *Gunter v. James*, (1908) 24 T.L.R. 868 (traction engines sending sparks on the highway); *Chaplin v. Westminster Corporation*, (1901) 2 Ch. 329 (erection of a lamp-post); *Manchester Corporation v. Farnworth*, (1930) A. C. 171; *S. S. Eurane v. Barrad Inlet Tunnel and Bridge Co.*, (1931) A. C. 300; *Rajmohan Bose v. E. I. Ry. Co.*, (1872) 10 B.L.R. 241 (location of railway workshops); *Rama Rao v. Martha Sequeira*, (1918) I.L.R. 42 Mad. 796; 37 M.L.J. 224 (location of latrine); *Nirmal Chandra v. Patna Municipality*, I.L.R. (1937) 1 Cal. 407; 1936 Cal. 707; *R. N. Rice & Oil Mills v. Purulia Municipality*, I.L.R. 22 Pat. 359; 1943 Pat. 408.

local authority, who were authorised by statute to erect and maintain a small-pox hospital were held to have no authority to erect it in such a way as to cause a nuisance to the plaintiff. The defendants had only a permissive authority to do an act which was not *per se* a nuisance and were therefore bound to exercise the power without invading the common law rights of others. The onus is on the party who pleads this defence to displace the presumption that when the legislature confers a power or discretion, it was intended to be exercised in strict conformity with private rights and not so as to invade them.¹ He can succeed only if there are clear words or indications in the statute to the contrary. The use of imperative and not merely permissive language, the provision of compensation for aggrieved persons, the grant of compulsory powers of acquisition are instances of such indications. For instance in *London and Brighton Railway Co. v. Truman*,² a railway company was, by their Act authorised to carry cattle and purchase by agreement, in addition to land which they were empowered to purchase compulsorily, any land not exceeding fifty acres, in such places as should be deemed eligible, for the purpose of providing yards for receiving or keeping the cattle conveyed by the railway. The Act contained no provision for compensation in respect of lands purchased by agreement. The company was held not liable for a nuisance arising from a cattle-yard. In a Madras case,³ the Madras City Municipal Act required that "the Commissioners shall provide a sufficient number of convenient and fitting places for burial and burning grounds within or without the City and may acquire land for that purpose." It was held that in view of the imperative language employed, the provision of compulsory powers of acquisition and of compensation for damage done in the exercise of their powers, they were not liable for choosing a particular place notwithstanding the resulting nuisance to the plaintiff. But these indications are not decisive. In *Canadian Pacific Railway v. Parke*,⁴ the defendants were authorised to irrigate their soil by the compulsory diversion of water from any adjacent stream, lake or river by conveying it over lands which did not belong to them and to run the surplus water over adjacent lands by means of ditches or drains, all subject to provisions for compensation; but, it was held that they were not entitled to bring water on their lands if it would have the result of causing a slide of the plaintiff's land. The principle was thus stated⁵ :

1. *Per* Lord Blackburn in 6 A. C. at p. 208.

2. (1885) 11 A.C. 45; see also *Harrison v. Southwark and Vauxhall Water Co.*, (1891) 2 Ch. 409. But a mortar-mill causing nuisance is not necessary for the construction of a railway line; *Fenwick v. E. London Railway Co.*, (1875) L. R. 20 Eq. 544.

3. *Muhammad Moideen Sait v. Madras Corporation*, (1901) I.L.R. 25 Mad. 118.

4. (1899) A.C. 535; for other instances of permissive powers, see *Powell v. Fall*, (1880) 5 Q.B.D. 579; *Roberts v. Charing Cross, etc., Ry. Co.*, (1903) 87 L.T. 732.

5. (1899) A.C. 544-5, *per* Lord Watson.

"Wherever, according to the sound construction of a statute, the Legislature has authorised a proprietor to make a particular use of his land, and the authority given is, in the strict sense of law, permissive merely, and not imperative, the Legislature must be held to have intended that the use sanctioned is not to be in prejudice of the common law right of others."

On the other hand, a clause that the undertakers shall have no immunity from proceedings for a nuisance arising in execution of the authorised works, or no authority to cause a nuisance, leaves no room for speculation and brings the case within the category of permissive authority.¹

21. Negligence in executing statutory authority.—The defence fails if the harm complained of is avoidable and due to negligence in doing the authorised act. In *Geddis v. Proprietors of Bann Reservoir*,² the defendants were authorised to secure a regular and proper supply of water to mill-owners through a certain channel and for that purpose to erect and maintain drains, channels, ways, etc. On account of their neglect to clean the channel, water overflowed its banks and did damage to adjoining lands. It was held that they were liable. The following statement of principle by Lord Blackburn³ is usually cited :

"It is now thoroughly well established that no action will lie for doing that which the legislature has authorised, if it be done without negligence, although it does occasion damage to anyone; but an action does lie for doing that which the legislature has authorised, if it be done negligently. And I think that if by a reasonable exercise of the powers either given by statute to the promoters, or which they have at common law, the damage could be prevented, it is, within this rule, "negligence," not to make such reasonable exercise of their powers."

When a person or body has statutory powers which he or they may at will exercise in a manner either hurtful or innocuous to others, it is negligence to choose the former mode.⁴ The negligence may be that of

1. *E.g.*, Gas Works Clauses Act, 34 & 35 Vict., c. 41, s. 9; *A. G. v. Gas Light & Coke Co.*, (1877) 7 Ch. D. 217; *Jordeson v. Sutton*, (1899) 2 Ch. 217. A similar provision occurs in Acts incorporating electric or water companies, *e.g.*, 62 & 63 Vict. c. 19, s. 81; *Shelfer v. City of London, Elec. Lighting Co.*, (1895) 1 Ch. 287; *Domerara Electric Co. v. White*, (1907) A.C. 330; *Price's Patent Candle Co. v. London C. C.*, (1908) 2 Ch. 526; and in the Public Health Act, 1875, s. 308; *Lingke v. Christ Church Corporation*, (1912) 3 K.B. 595.

2. (1878) 3 A.C. 430; for other cases, see above, Chap. VI, para. 16; also *Lawrence v. G. N. Ry. Co.*, (1851) 16 Q.B. 643; *Whitehouse v. Fellowes*, (1861) 10 C.B.N.S. 765; *Biscoe v. G. E. Ry. Co.*, (1873) L.R. 16 Eq. 636; *Southwark and Vauxhall Water Co. v. Wandsworth Board of Works*, (1898) 2 Ch. 602; *Dawson v. Bingley, U. D. C.*, (1911) 2 K.B. 149; *Manchester Corporation v. Farnworth*, (1930) A.C. 171; *Pronek v. The Winnipeg, etc., Ry. Co.*, (1933) A.C. 51; *Bond v. Norman*, (1940) 1 Ch. 429; *Gaekwar of Baroda v. Gandhi Kacharabhai*, (1902) I.L.R. 27 Bom. 344 (P.C.); 30 I.A. 60; *Maya Ram v. Municipal Committee of Lahore*, 1929 Lah. 730. The rule applies to public authorities dealing with the property of a subject; *Welden v. Smith*, (1924) A.C. 484.

3. 3 A.C. at p. 455.

4. *Lagan Navigation Co., v. Lambeg Bleaching Co.*, (1927) A. C. 226 at p. 243; *Providence Millers Ltd., v. Southampton C. C.*, (1939) 4 A. E. R. 157 (onus of proof on defendant authority).

the defendant himself, his servant or independent contractor.¹ The duty is however only to take reasonable care to avoid harm and not an absolute duty to prevent harm arising from the work done under statutory authority.² There is no difference in respect of the responsibility to take care between private persons and public bodies, or between works done for profit and those done only for public benefit. In *Mersey Docks and Harbour Board v. Gibbs*,³ it was laid down that persons or corporations who construct docks or other works under statutory authority are bound to construct and maintain them with reasonable care.

22. Improper or irregular exercise of statutory power.—The defence fails if the power or discretion conferred by statute is not exercised *bona fide* or in good faith,⁴ and in accordance with the requirements or formalities prescribed by the statute.⁵ The above does not apply to judicial powers and no action lies against a judicial officer on the ground that he exercised his powers maliciously or dishonestly.

23. Necessity.—The principle of this defence is far-reaching in the law and enters into many defences appearing under different labels, *e.g.*, executive or military authority in times of war or rebellion, self-defence. Other illustrations of the principle are measures adopted in times of danger or emergency, like throwing water on a house on fire or pulling it down to prevent the fire spreading,⁶ the use of force by the master of a ship to preserve order and the safety of the ship,⁷ throwing cargo overboard to save a ship in danger during a storm,⁸ forcible feeding of a prisoner on hunger-strike in a gaol,⁹ rendering first aid to a person injured in an accident, even the performing of an operation on him without his

1. *E.g.*, *Hardaker v. Idle U. D. C.* (1895) 1 Q.B. 335.

2. *Hammond v. Vestry of St. Pancras*, (1874) L. R. 9 C. P. 216; *Evans v. Mayor of Liverpool*, (1906) 1 K.B. 160.

3. (1864) L. R. 1 H. L. 93; above, Chap. VI, para. 16. See *Manchester Corporation v. Markland*, (1936) A. C. 360.

4. *Everett v. Griffiths*, (1921) 9 A.C. 631, 695; see also *Stockton v. Brown*, (1860) 9 H.L.C. 246; *Westminster Corporation v. L. & N. W. Ry. Co.*, (1905) A.C. 426; *Short v. Poole*, (1926) Ch. 66; *Fennell v. East Ham Corporation*, (1926) Ch. 641; *Nagar Valab v. Municipality of Dhandhuka*, (1887) I.L.R. 12 Bom. 490; *Muhammad Moidin Saif v. Madras Corporation*, (1901) I.L.R. 25 Mad. 118, 138; *Lalbhai v. Municipal Commissioner of Bombay*, (1901) I.L.R. 33 Bom. 334; 10 Bom. L.R. 821; above, para. 16, p. 531, notes 5 to 9.

5. *Herron v. Rathmines Improvement Commissioners*, (1892) A.C. 498; an injunction will be granted to prevent the exercise of the power otherwise than in accordance with the statute though no damage is proved.

6. (1507) Y.B. 21 Hen. 7, fo. 27, pl. 5; *Dyer* 36 (b); *Pollock, Torts*, p. 132; *Salmond, Torts*, p. 20; *Cope v. Sharpe*, (1910) 1 K.B. 168 (setting fire to bush in a forest to prevent another fire spreading, justified); *Cope v. Sharpe (No. 2)*, (1912) 1 K.B. 496.

7. *The Agincourt*, (1824) 1 Hagg. 271, 274; *Aldworth v. Stewart*, (1866) 4 F. & F. 957.

8. *Aldworth v. Stewart*, (1866) 4 F. & F. 957.

9. *Leigh v. Gladstone*, (1909) 26 T.L.R. 139.

consent or knowledge if it is urgently needed to save his life.¹ The defence is available if the act complained of was reasonably demanded by the danger or emergency.² A person cannot, for avoiding harm to his land, divert a flood from it to his neighbour's property.³ He can however put up an embankment to prevent the water entering his land though thereby his neighbour's land is flooded.⁴ Similarly a person was held not liable for driving away from off his land a swarm of locusts which in consequence entered the plaintiff's land and damaged his crops.⁵

24. Consent.—Harm suffered by consent is not actionable. This is usually expressed by the maxim *volenti non fit injuria*,⁶ what is consented to is not an injury. The consent may be express or implied.

25. Express consent.—Consent is express, for instance, where a person submits to a surgical operation or invites a person to enter his premises. He cannot sue the surgeon for battery or the guest for trespass. Under the Indian Penal Code consent does not excuse an act intended to cause death or grievous hurt.⁷ Therefore, a person can be prosecuted for causing physical injury or death in the course of a duel with swords or pistols, an encounter with naked fists, a kicking match, or a prize-fight.⁸ Whether he can also be sued for damages is doubtful, as the conduct of the party consenting to the harm may negative any breach of duty towards him.⁹ The principle of express consent may arise for application in other cases than those of bodily harm. In *Chapman v. Lord Ellesmere*,¹⁰ a case of defamation, the plaintiff, a trainer of racehorses, had a licence from the stewards of a Jockey Club which was subject to the condition that they could in their discretion cancel the licence and warn any person off the race-club and also authorise the publication of that fact in the Racing Calendar, the recognised organ of the club. It was held that the plaintiff could not complain of such a publication about himself, though it bore a defamatory meaning. Consent would not excuse responsibility for breach of duty imposed by statute.¹¹

1. Pollock, Torts, p. 133

2. Cf. I.P.C., s. 81. See Restatement, §197, Illustration 8.

3. *Whalley v. L. & Y. Ry. Co.*, (1884) 13 Q.B.D. 131; *M. S. M. Ry. Co. v. Maharaja of Pithapuram*, I.L.R. 1937 Mad. 919; 1937 Mad. 703; *Khurshed Hussain v. Secretary of State for India*, 1937 Pat. 302. Above, Chap. VI, para. 27.

4. Above, Chap. VI, paras. 22 and 75. See also *Shankar v. Laxman*, 1938 Nag. 239.

5. *Greyvensteyn v. Hattingsh*, (1911) A.C. 355.

6. The maxim was used in the civil law where the case is put of a man being sold as a slave with his consent. As to its history in the English case-law, see Beven, *Negligence*, p. 787.

7. I.P.C., ss. 87, 88.

8. *R. v. Coney*, (1882) 8 Q.B.D. 534.

9. Salmond, Torts, p. 38; *Christopherson v. Bart*, (1848) 11 Q.B.D. at p. 477, per Lord Denman; *R. v. Coney*, 8 Q.B.D. at p. 533, per Hawkins, J; see however, Pollock, Torts, p. 126, Winfield, Province, pp. 86-91.

10. (1932) 2 K.B. 431. 11. *Bowmaker Ltd. v. Tabor*, (1941) 2 K.B. 1 C.A.

26. Implied consent.—Consent will be implied where the injury complained of was incidental to the thing consented to. A player in a game of football or hockey cannot sue another for assault or injury arising in the course of the game.¹ If however the injury was due to foul play or to a wilful assault not incidental to the game, it is actionable. In *Hall v. Brooklands Auto-Racing Club*,² some of the spectators of a motor race who were injured as a result of a collision between two racing cars could not recover from the owners of the racing track. A trespasser or a thief who, when scaling over a wall at night, is hurt by sharp spikes or glass pieces cannot obviously sue the occupier of the premises.³ Nor can he sue for harm caused by any trap or danger not set for him by the occupier.⁴ A workman who is engaged in a dangerous work cannot sue the employer for harm necessarily incidental to the work such as handling dangerous machinery or explosives, working on a high tower or roof, being employed as an acrobat or a lion-tamer in a circus. In such cases his consent to the necessary risks of the employment will be implied. This inference was extended by the doctrine of common employment to risks due to the faults of fellow-workmen in the same employment.⁵ But consent will not be implied when the risks are not necessary or unavoidable and are due to a breach of duty of the employer to his servant, *e.g.*, to use due care to provide competent fellow-servants and a safe system of work.⁶

27. Inference of consent from knowledge.—Ordinarily a person's knowledge of the risk to which he exposes himself would lead to an

1. See 66 U. S. L. R. p. 291, 35 Law Notes, p. 153 and 36 Law Notes p. 35, for American cases where a golf player or a caddy failed to recover damages for injury by being hit by a golf ball.

2. (1933) 1 K.B. 205; above, Chap. XIV, para. 19. For cases of injuries to spectators of a game of base-ball, see 66 U.S.L.R., p. 407. See also *Cleghorn v. Oldham*, (1927) 62 W. N. 146 where a spectator of golf recovered for injury negligently caused by the player. See (1933) 75 L.J. 42.

3. But setting of spring-guns is an offence; above, Chap. XIV, page, 410, note 4. As to an owner of a dog not being able to sue for its being hurt or killed by dog-spears in a wood, see *Jordin v. Crump*, (1841) 8 M. & W. 782; *Townsend v. Wathen*, (1808) 9 East. 281. Below, para. 30, note 6.

4. Above, Chap. XIV, para. 28.

5. Above, Chap. XVI, para. 19.

6. *Williams v. Birmingham Battery Co.*, (1899) 2 Q.B. 338 (failure to provide a ladder for plaintiff working on an elevated tramway); *Monaghan v. Rhodes*, (1920) 1 K.B. 487 (unsafe ladder for dock labourer); *Baker v. James*, (1921) 2 K.B. 674 (supplying a defective motor car for a commercial traveller); *Russel v. Criterion Film Productions, Ltd.*, (1935) 3 A.E.R. 627, 634; *D'Urso v. Sanson*, (1939) 4 A.E.R. 26 (watchman burnt to death when going inside a building on fire due to employer's negligence). On the question whether there was a duty, older decisions were more unfavourable to workmen, *e.g.*, *Shipp v. Eastern Counties Ry. Co.*, (1853) 9 Ex. 223; *Woodley v. Metropolitan Ry. Co.*, (1877) 2 Ex. D. 384. The attitude of judicial and public opinion underwent a change during the latter half of the last century. The changed attitude is represented by cases like *Smith v. Baker*, below, note 2, and by the Employers' Liability Act, 1880. Under this Act, if there is a defect or negligence under s. 1, knowledge of the workman can be a defence only under the restricted conditions specified in s. 2, clause 3.

inference of his consent or assumption of that risk. But it would not if his injury was due to a breach of duty of another person to protect him from that risk. Thus in an action by a workman against his employer for bodily harm due to the failure of the latter to provide a safe system of work, it is no defence to the latter that the former worked with knowledge of the danger due to a faulty system of work. In such cases mere knowledge is not consent. "The maxim, be it observed, is not *scienti non fit injuria*, but *volenti*."¹ In *Smith v. Baker*,² a workman employed in drilling holes in a rock cutting near a railway line was held entitled to recover for injury due to a stone falling from a crane which lifted stones and swung them over his head without warning. It was held that the employers were guilty in not providing safe conditions of work for the plaintiff, and knowledge on the latter's part of unsafe conditions was not enough to show that he consented to take the risk of injury. A driver who was compelled to drive a vicious horse of his employer in spite of his protest was held entitled to recover for injury by being kicked by it on the way.³ In *Olsen v. Corry & Gravesend Aviation, Ltd.*,⁴ the plaintiff, an apprentice with the defendants, a firm of ground engineers at an aerodrome, was injured while swinging the propeller of an aeroplane. It was held that the defendants were liable by reason of the faulty system of starting aeroplanes taught by them and their instructors and the plaintiff could not have appreciated the risk due to it. In a Madras case,⁵ the defence of consent was held not available to an employer who adopted a dangerous method of breaking up cast iron by dropping a heavy weight from a great height on pieces of iron with the result that a piece of iron flew and killed a workman at a considerable distance. Consent of the workman will not be implied from mere knowledge of danger due to breach by the employer of a duty under statute, *e.g.*, under the Factories Acts to fence dangerous machinery.⁶ An occupier of premises is liable for breach of duty to avoid harm from an unexpected danger to an invitee; a passenger in a railway train was thus held entitled to recover for injury due to a staircase which was slippery with snow,

1. *Per Bowen, L.J.*, in *Thomas v. Quartermaine*, (1887) 18 Q.B.D. 685, 696.

2. (1891) A.C. 325. There is nothing of course to prevent express consent to such risks unless it is barred by statute.

3. *Yarmouth v. France*, (1887) 19 Q. B. D. 647.

4. (1936) 155 L. T. 512; Chap. XVI, para. 21.

5. *South Indian Industrials v. Alamelu Ammal*, (1923) 17 L. W. 495.

6. *Holmes v. Clarke*, (1862) 31 L. J. Ex. 356; *Britton v. G. W. Cotton Co.*, (1872) L. R. 7 Ex. 130; *Davies v. Owen*, (1919) 2 K. B. 39; see also *Baddeley v. Earl Granville*, (1887) 19 Q. B. D. 423 (duty to provide banksmen in shafts in a mine); *Senior v. Ward*, (1859) 1 E. & E. 385 (to test the ropes of the shaft daily before use); see also *Groves v. Wimborne*, (1893) 2 Q. B. 402; *Wheeler v. New Merton Board Mills*, (1933) 2 K. B. 669. But where the servant himself created the danger by violating a statutory regulation, it would be otherwise; see *Hillen v. I. C. I., (Alkali), Ltd.*, (1934) 1 K. B. 455; (1930) A. C. 65.

CHAPTER XIX.

REMEDIES.

1. **Remedies.**—The remedies available for a tort are (a) extra judicial, and (b) judicial.

2. **Extra-judicial remedies.**—They are expulsion of a trespasser,¹ re-entry on land,² distress damage feasant,³ recaption of goods,⁴ and abatement of nuisance⁵.

3. **Judicial remedies.**—The ordinary judicial remedies are an action for damages,⁶ injunction, recovery of possession of property, movable⁷ or immovable,⁸ declaration of title to property.⁹ Some extraordinary judicial remedies are a writ of *habeas corpus* for production of a person in another's custody, a writ of mandamus to direct the performance of a public duty imposed by statute.¹⁰ When a tort is also a crime, e.g., defamation or wilful trespass to person or property, the remedy of criminal prosecution is also available.

4. **Damages.**—Damages, which term means here 'unliquidated damages,' are the primary relief in an action for a tort.¹¹ The phrases, exemplary, substantial, nominal and contemptible damages have already been explained.¹² The phrases, general and special damages, are also sometimes used.¹³ General damages are the pecuniary reparation for the damage which is presumed to follow from the injury, e.g., in a case of assault or libel. It is not necessary to aver such damages in the pleading. Special damages are the pecuniary equivalent of the actual loss sustained, e.g., medical expenses incurred by reason of bodily harm, loss of business due to a libel. The plaintiff can recover such damages only if he expressly avers and claims them. In England damages were assessed usually by a jury. Now since the power of the judge to dispense with a jury in actions for tort has been widened by an Act of 1933,¹⁴ damages are

1. Above, Chap. IV, para. 42.

2. Above, Chap. IV, para. 43.

3. Above, Chap. IV, para. 44.

4. Above, Chap. IV, para. 35 and Chap. V, paras. 17 and 56.

5. Above, Chap. VI, para. 88.

6. There can be no representative action for damages; *Narayana Mudali v. Peria Kalathi*, 1939 Mad. 783.

7. Above, Chap. V, para. 70.

8. Above, Chap. IV, para. 53.

9. Above, Chap. IV, para. 56.

10. Above, Chap. XVII, para. 11.

11. Above, Chap. I, para. 13.

12. Above, Chap. I, para. 13; Chap. II, para. 30; Chap. VII, para. 83.

13. Above, Chap. VII, para. 80.

14. Administration of Justice Act, 1933, s. 6. It is said public opinion is turning back again to trial by jury; 53 L.Q.R. 209. Above, Chap. I, para. 8. As to power of appellate courts on the question of damages, see *Mechanical and General Inventions Co. v. Austin*, (1935) A.C. 346; *Owen v. Sykes*, (1936) 1 K.B. 192; *Roach v. Yates*, (1938) 1 K.B. 256; *Davies v. Powell Duffryn Associated Collieries Ltd.*, (1940) A.C. 601; on the question of apportionment of damages, see *S.S. Ceramic v. S.S. Testbank*, (1942) 1 A.E.R. 281 C.A.; *British Fume v. Mac Gregor*, (1943) A.C. 197; *Ingram v. United Automobile Services Ltd.*, (1943) 2 A.E.R. 71 C.A.

assessed by a judge¹ in many cases, *e.g.*, in actions for physical injury. In India the trial of civil actions is by a judge and without a jury.

5. Injunction.—While damages are a matter of right, injunction is only a discretionary remedy. The latter is usually asked for in the case of nuisance but is available in the case of any other tort, *e.g.*, a libel.² In that respect courts have now a wider jurisdiction than the old courts of equity which issued injunctions only to restrain injury to property.³

6. Topics considered in the Chapter.—The following topics have to be considered in respect of the remedy of a civil action:—(i) Parties; (ii) Personal incapacity to sue; (iii) Personal incapacity to be sued; (iv) Joint right of action; (v) Joint wrongdoers; (vi) Death of parties; (vii) Accord and satisfaction; (viii) Assignment of right to sue; (ix) Place of suing; (x) Action for tort committed abroad; (xi) Limitation of actions; (xii) Notice of action; (xiii) Sanction of Government; (xiv) Successive actions for the same injury; (xv) Waiver of tort; (xvi) Alternative causes of action in tort and contract; (xvii) Tort amounting to a felony.

7. Parties.—Ordinarily the person wronged can sue the wrongdoer but there are exceptions arising from incapacity to sue or to be sued.

8. Incapacity to sue.—The following cases have to be considered: (a) Alien enemy, (b) Foreign State, (c) Convict, (d) Bankrupt, (e) Married woman, (f) Corporation.

9. Alien enemy.—An alien enemy, *i.e.*, a person who voluntarily resides or carries on business in a country at war with England, cannot sue.⁴ The disability attaches also to a person resident or carrying on business in a country or territory effectively occupied by the enemy country, *e.g.*, Holland occupied by Germany during the present war.⁵ As residence in enemy territory is the only test, even a British subject resident there will fall within the description. "It is not a question of nationality or of patriotic sentiment"⁶. An alien enemy residing in British India with the permission of the Central Government may sue, but not if he resides here without such permission or if he resides in a foreign territory.⁶ An alien friend can sue

1. As to a judge being able to avoid awarding exemplary damages in a case of libel, see above, Chap. VII, para. 83.

2. Above, Chap. VII, para. 79.

3. See on this subject *Springhead Spinning Co. v. Riley*, (1868) L.R. 6 Eq. 551; Roscoe Pound, 29 Har. L.R. 640; Zechariah Chafee, *Equitable Relief against Tort*; cf. *Specific Relief Act*, s. 54, Illustration (i).

4. *Porter v. Freudenburg*, (1915) 1 K B 857. He may be a formal party; *Rodrigues v. Speyer*, (1919) A.C. 59. See *Eichengruen v. Mond*, (1940) 3 A.E.R. 148 C.A.

5. *Soufracht v. Van Udens*, (1943) A.C. 203, 211, per Lord Simon. cf. *Mannasseh Film Co. v. Gemini Pictures Circuit*, 1 L.R. 1944 Mad. 124.

6. C.P.C., s. 83.

in an English or Indian Court. He cannot however do so in respect of a wrong done to him by the authority of the Government.¹

10. Foreign State.—A foreign State cannot sue in any court of British India unless such State has been recognised by His Majesty or by the Central Government.²

11. Convict.—In England a convict who is sentenced to death or penal servitude on any charge of treason or felony cannot sue for wrongs to his property, because it vests by statute³ in an administrator or interim curator. He can however sue for a tort to his person. There is no such statute in India.

12. Bankrupt.—A bankrupt or insolvent who has been adjudicated as such cannot sue for a wrong to his property, as it vests in the Official Receiver.⁴ He can however sue for a wrong to his person or reputation.⁵

13. Married woman.—In England, a married woman had under the common law certain disabilities resulting from the doctrine that husband and wife are one person in the eye of law. She could not sue or be sued without her husband being joined as a party-plaintiff or defendant. The Married Women's Property Act, 1882, enabled her to sue in respect of her separate property. Now by the Law Reform (Married Women and Tortfeasors) Act, 1935,⁶ she can sue and be sued as if she were a *feme sole*. She could not under the common law sue her husband at all and this disability still remains except in regard to torts to her property. It has been justified on the ground that litigation between them is unseemly and would disturb domestic peace.⁷ She can sue him for trespass or trover but not for assault,⁸ libel⁹ or negligence.¹⁰ Therefore it has been humorously remarked that a husband may with civil impunity break her leg but not

1. *Buron v. Denman*, (1848) 2 Ex. 167.

2. C.P.C., s. 84.

3. (1870) 33 & 34 Vict., c. 23, ss. 6, 8.

4. *E.g.*, Provincial Insolvency Act (V of 1920), s. 28; Presy. Towns Insolvency Act, (III of 1909), ss. 2, 17.

5. *Beckham v. Drake*, (1841) 2 H.L.C. 579, 604; *Ross v. Buckett*, (1901) 2 K.B. 449; *Wilson v. United Counties Bank*, (1920) A.C. 102, 120.

6. 25 and 26 Geo. 5, c. 30, s. 1.

7. *Gottliffe v. Edelston*, (1930) 2 K. B. 378, 392; Winfield, *Law of Tort*, pp. 106-107. For a similar rule between parent and child in the U. S. A., see above, Chap. XVIII, *infra*, 17, page 532, note 6.

8. *Phillips v. Barnett*, (1876) 1 Q. B. D. 436.

9. *Ralston v. Ralston*, (1930) 2 K. B. 238. She cannot sue him for deceit but can sue for rescission of a deed of separation procured by her husband's fraud; *Hulton v. Hulton*, (1917) 1 K. B. 813.

10. *Gottliffe v. Edelston*, (1930) 2 K. B. 378, an interesting case where an action for injury due to negligence abated by reason of the plaintiff marrying the defendant. She cannot sue him for loss of expectation of life; *Chant v. Read*, (1939) 2 A. E. R. 286.

her watch. Though a wife cannot recover for her husband's tort by suing him she can sue another if the husband committed it as the latter's agent. Thus where a person drove his mother's car and injured his wife who was a passenger in it by negligent driving, the wife recovered damages against the mother.¹ The Hindu and Mahomedan laws do not contain any similar rules of disability. As regards Christians and others to whom the English common law applies, the Married Women's Property Act in India² contains provisions similar to those of the English Act in respect of the right to own separate property.

14. Corporation.—A corporation is a 'person' in the eye of law and can sue for wrongs to its property or business. It cannot sue for any personal injury to the members comprising it, *e.g.*, defamation. In such a case they are the proper persons to sue.³

15. Incapacity to be sued.—The following cases have to be considered: (a) The King, (b) Public officers, (c) Foreign Sovereigns and ambassadors, (d) Infant, (e) Lunatic, (f) Married woman, (g) Corporation, (h) Unincorporated association.

16. The King.—The King can do no wrong. This means really that he is not liable to be sued in his own courts. Where he does a wrong through his agents or servants, they can be sued and the King's command is no protection to them. But the King himself cannot be sued. In England the remedy known as a petition of right is available against the King for a breach of contract but not for a tort.⁴ It would however lie for recovery of property or money wrongfully retained in the possession of the Crown.⁵

17. Public officers.—Ordinarily there is no bar to a suit against a public officer for his tort. But by statute, immunity may be conferred on particular officers. For instance the Government of India Act, 1935,⁶ enacts, as did the previous Acts, that no proceeding shall lie in any court in India against the Governor-General, the Governor of a Province or the Secretary of State for India.

18. Foreign Sovereigns and ambassadors.—A foreign Sovereign cannot be sued in an English or Indian court unless he submits to its

1. *Smith v. Moss*, (1940) 1 K. B. 424

2. Act III of 1874, see also s. 20 of the Indian Succession Act, (XXXIX of 1925).

3. Above, Chap. VII, para. 10.

4. *Tobin v. The Queen*, (1864) 10 C.B.N.S. 310; *Feather v. The Queen*, (1865) 6 B. & S. 257; *Guarard v. Mauritius Government*, (1939) 2 A.E.R. 178 P.C. As to this rule of immunity and its limits, see Holdsworth, Vol. IX, pp. 41-43, Dr. A. L. McNair, 43 L.Q.R. p. 9.

5. Above, Chap. XVI, para. 27.

6. S. 306. As to Governors of Colonies, see *Mostyn v. Fabrigas*, (1774) Sm. L.C., Vol. I, p. 642; *Hill v. Bigge*, (1841) 3 Moo. P.C. 465; *Musgrove v. Pulido*, (1879) 5 A.C. 102; *Sprigg v. Sigcan*, (1897) A.C. 238.

jurisdiction.¹ A ruler of an Indian State is a foreign Sovereign for the purpose of a suit in an English court.² He can be sued in a British Indian court only with the consent of the Crown Representative.³ An ambassador or diplomatic agent and his family and suite have the same protection.⁴

19. Infant.—An 'infant' means in law a person who is below eighteen years of age in India and twenty-one years in England. In the law of torts infancy or minority is not *per se* a ground of exemption from liability. On the other hand in the law of contracts, an infant is incapable of being a party to a contract and cannot be sued for a breach of contract.⁵ In the criminal law, a child below seven years of age is incapable of committing an offence,⁶ and a child above seven and below twelve years is not guilty of a crime, if he has not attained sufficient maturity of understanding to judge of the nature and consequences of his conduct.⁷ An action against an infant for a tort may however not be sustainable in the following cases :—

(i) The immature age of the infant may disprove an unlawful intent or motive which is an essential ingredient in the tort; *e.g.*, technical assault or battery, deceit.

(ii) In cases of defamation, the youth of the defamer, though *per se* no excuse,⁸ may disprove an injurious tendency of his words as reasonable men may not take them seriously.

(iii) An action against an infant will not lie if it is nominally in tort but is in substance in contract. In *Jennings v. Rundall*,⁹ the plaintiff sued for injury to a mare which the defendant, a minor, hired of him for riding and which in the course of the journey was strained and met with

1. *Duke of Brunswick v. The King of Hanover*, (1844) 6 Beav. 1; *The Parlement Belge*, (1880) 5 P.D. 197; *Mighell v. Sultan of Johore*, (1894) 1 Q.B. 149. See *The Arantzazu Mendi*, 1939 A.C. 256 (Spanish National Government cannot be sued).

2. *Statham v. Statham and the Gaekwar of Baroda*, (1912) P. 92. 3. C.P.C., s. 86.

4. The Diplomatic Privileges Act, 1708 (7 Anne. c. 12); *Magdalena Steam Navigation Co. v. Martin*, (1859) 2 E. & E. 94; *In re Republic of Bolivia Exploration Syndicate, Ltd.*, (1914) 1 Ch. 139; *In re Soares*, (1918) 1 Ch. 176; *Engelke v. Musmann*, (1928) A.C. 433; *The Amasone*, (1940) P. 40, C.A.; see also *Ghikis v. Musurus*, (1909) 25 T.L.R. (wife of ambassador). The privilege does not extend to a Consul; *Viveash v. Becker*, (1814) 3 M. & S. 284.

5. Indian Contract Act, s. 11.

6. *A. P. C.*, s. 82.

7. *I. P. C.*, s. 83. The higher limit is fourteen years in England.

8. *Per* Lord Kenyon C. J., in *Bristow v. Eastman*, (1794) 1 Esp. at p. 173; and in *Jennings v. Rundall*, (1799) 8 T. R. at p. 337.

9. (1799) 8 T. R. 335; see the criticism of this case in Salmond, Torts, p. 67 note. The decision is explicable on the ground that it upheld a plea of demurrer and means no more than that the pleading alleged no facts which would support a case of negligence or other breach of a delictual duty. See also *Fawcett v. Smethurst*, (1915) 84 L.J.K.B. 473 (where a minor hired a car for a 6 miles' drive but drove it for 18 miles and it was accidentally damaged on the way, he was held not liable).

an accident. It was held that this was in substance an action for breach of contract and could not be altered by the mere allegation that the defendant acted wrongfully or maliciously. On the other hand if the defendant had really been proved to have committed a wrong independent of contract, he would have been liable. In *Burnard v. Haggis*,¹ the defendant, an undergraduate aged twenty, hired a horse of the plaintiff for riding, on the express condition that it was not to be used for jumping. He lent it to a friend and got another horse for himself and both set out across fields and fences and the plaintiff's horse when made to jump over a high fence was impaled on it and killed. It was held that the defendant was liable for negligence apart from contract. Similarly in *Ballet v. Mingay*,² an infant obtained from the plaintiff an amplifier and a microphone but failed to return them on demand as he lent them to a third party and was unable to get them back. It was held that by parting with them he acted outside the contract of bailment which was not shown to allow his doing so. Therefore he was held liable in detinue for the value of the goods.

(iv) An action in tort would not be allowed if it would defeat the rule against suing a minor in contract. An action of deceit would not lie against a minor on the ground that he procured a contract by fraud and broke it, *e.g.*, by obtaining a loan or purchasing goods by a false representation as to age or any other matter.³ If such actions were allowed, it was said, all the minors in England would be ruined. Similarly an action for conversion cannot be brought for the value of goods wrongfully obtained.⁴ He is however under an equitable obligation to restore any specific chattel or possession of premises obtained under an invalid contract.⁵ He cannot take advantage of his own fraud; "the protection given to him was to be used as a shield and not a sword."⁶ Where there is no contract, he can be compelled to refund monies or property obtained by fraud or embezzlement.⁷

Except in the above cases infancy is by itself no excuse. There are however two matters on which there is some uncertainty. The first is whether a child of tender years and incapable of the exercise of volition can

1. (1863) 14 C. B. N. S. 45; see also *Walley v. Holt*, (1876) 35 L. T. 631.

2. 1943 1 K.B. 281 C.A..

3. *Johnson v. Pie*, (1665) 1 Sid. 258; *Leslie, Ltd. v. Sheill*, (1914) 3 K.B. 607; *Dhanmull v. Ram Chunder*, (1890) 1 L.R. 24 Cal. 265; 1 C.W.N. 270; see also *Cowern v. Nield*, (1912) 2 K.B. 419.

4. *Stocks v. Wilson*, (1913) 2 K.B. 235.

5. *Lempriere v. Lange*, (1879) 12 Ch. D. 675.

6. *Jennings v. Rundell*, (1799) 8 T.R. 335, *per* Lord Kenyon quoting Lord Mansfield.

7. *Bristow v. Eastman*, (1794) 1 Esp. 172.

be sued for a trespass to person or property.¹ There is no authority on the subject in England or in India. In the United States there are some stray cases holding children below seven years liable.² Another question is whether an immature youth can be held liable for negligence. It has been suggested that he should be judged by the standard of care that can be expected of a person of his age and not by that of an adult.³ This would be at variance with the objective standard applied elsewhere in the law of negligence. Besides there appears to be no reason why a youth who in mischief or in sport meddles with a dangerous chattel or takes out a motor car and runs over another should not pay from his resources compensation to the injured person⁴. The cases on the subject of contributory negligence of children⁵ cannot furnish any analogy as the question of a breach of duty to a child is governed by considerations different from those arising in a case where a person complains of injury by a child.⁶ The parent or guardian in charge of a child can of course be sued for negligence in allowing the child to cause injury.⁷ There does not appear to be any obstacle in the way of holding an infant vicariously liable for wrongs of his agents or servants, any more than there is in the case of a corporation or an idol in a Hindu temple.

20. Lunatic.—The rules formulated above as regards cases where an infant cannot be sued for a tort would apply also to a lunatic.⁸ The question of the liability of the lunatic in other cases is subject to the same uncertainty. The opinion of mediaeval writers and judges in England was that neither lunacy nor extreme infancy was a defence to an action of trespass.⁹ The opinion of modern text-writers¹⁰ is, however, in favour of the opposite view, *viz.*, that a person incapable of volition cannot in law be held responsible for his act. There is no decision in point in England¹¹ or in India, but in the United States, courts have held lunatics

1. There is a dictum of Bramwell, B., suggesting the affirmative in *Mangan v. Atterton*, (1866) L.R. 1 Ex. at p. 240. See also Salmond, Torts, p. 66; Burdick, Torts, p. 145, suggests that the injury would be deemed an inevitable accident.

2. Cooley, Torts, Vol. I, p. 177; Bohlen, Studies, p. 543.

3. Salmond, Torts, p. 66; Clerk & Lindsell, Torts, p. 45; see, however, Cooley, Torts, Vol. I, p. 180.

4. See, however, *Motor House Co., Ltd. v. Charlie*, (1928) I.L.R. 6 Rang. 763, where the reasoning appears to be of doubtful soundness.

5. Above, Chap. XIV, para. 88.

6. See, however, Bohlen, Studies, pp. 568-570.

7. *Beebe v. Sales*, (1916) 32 T.L.R. 413.

8. Above, para. 19.

9. Holdsworth, Vol. III, pp. 371, 372; *Weaver v. Ward*, (1616) Hobart 134; for other references, see Salmond, Torts, p. 70; Bohlen, Studies, p. 545. See Above, Chap. II, para. 3; Chap. XIII, para. 10.

10. Pollock, Torts, p. 55; Salmond, Torts, p. 48; Clerk & Lindsell, Torts, p. 47.

11. See the dictum of Lord Esher in *Hanbury v. Hanbury*, (1892) 8 T.L. Rat, p. 560.

liable on grounds of policy.¹ It has been said that there is greater justice in holding that the lunatic's estate should bear the consequences of his misfortune than that he should be supported at the expense of the public or of his neighbours.² This argument is not without force and will doubtless have to be considered when the question does arise. In a New Zealand case,³ a lunatic was held liable for wounding the plaintiff by firing a gun at him. Sir Frederick Pollock⁴ disapproved of this decision and asked whether the New Zealand Court would hold a delirious fever patient liable. The chances of injury by a person in that condition must be very rare, much rarer than those of violence of lunatics. But if such an injury can occur, there appears to be no reason why he should not pay subject to such defences like contributory negligence. The hardship in his case does not seem necessarily to outweigh that in denying compensation to the innocent sufferer. The person or authority in charge of a lunatic will of course be liable if his or its negligence was the cause of the injury.⁵ The raving of a lunatic or delirious patient or the prattle of a child would hardly be defamatory.⁶ An action for defamation would not therefore lie against these persons,⁷ but not on the ground of want of intention or volition. It is of course no defence that a person was drunk at the time of committing a tort.⁸

21. Married woman.—In England a married woman cannot under the common law be sued alone for a tort but her husband also had to be joined as a party—defendant and was liable as a joint tortfeasor.⁹ Now by the Law Reform Act, 1935, this is no longer law¹⁰ and she can be sued alone in tort or contract or otherwise. She cannot however be sued by her husband in tort.¹¹ There are no such obstacles in the way of suing a married woman under the Hindu or Mahomedan law.

22. Corporation.—A corporation is a 'person' in the eye of the law and can be sued in the same circumstances as a natural person. It can obviously be liable only vicariously for the torts of its agents or servants acting in the course of their employment. It may therefore become liable

1. *Williams v. Hays*, (1894) 143 N.Y.R. 442, where the authorities are collected. See also Bohlen, *Studies*, p. 545. This is said to be the rule also in some continental laws; Winfield, *Law of Tort*, p. 117, note (m).

2. Cooley, *Torts*, Vol. I, p. 172. See, however, Burdick, *Torts*, p. 70.

3. *Donaghay v. Brennan*, (1900) 19 N.Z.L.R. 289.

4. *Torts*, p. 49, note (c). The editor of the 14th ed. does not agree; p. 49, note (d).

5. *Hoigate v. Lancashire Mental Hospitals Board*, (1937) 4 A.E.R. 19.

6. Burdick, *Torts*, p. 69.

7. See, however, the remarks of Kelly, C.B., in *Mordaunt v. Mordaunt*, (1870) L.R. 2 P. & D. 109 at p. 142.

8. Cf. I.P.C., ss. 85, 86.

9. Per Erie, C.J., in *Cyrel v. Powell*, (1864) 17 C.B.N.S. 743, 748. This was only during coverture and not after the death of either party or divorce or judicial separation; *Cuenod v. Leslie*, (1909) 1 K.B. 830.

10. Above, Chap. XVI, para. 1.

11. *Webster v. Webster*, (1916) 1 K.B. 714; see on this subject, 43 Har. L.R. 1640.

not merely for negligence¹ but for torts like libel, malicious prosecution or deceit, though it has no mind and is incapable of malice or fraud.² But the liability of a corporation to pay compensation from its corporate funds for wrongs done by its officers may be limited by the statute of incorporation. In such cases the remedy can only be against the actual wrongdoer. For instance, under the Government of India Act, 1858, the Secretary of State for India in Council was constituted as a body corporate and could be sued only in certain circumstances for the wrongs of public officials.³ In India, an idol in a Hindu temple is regarded as a legal person and can be sued like a corporation for the wrongs of its manager, trustee or servant.⁴ The same is the position in the case of a Mahomedan mosque.

23. Unincorporated association.—An unincorporated association of persons has no legal entity and cannot sue or be sued as such.⁵ The only course open to the person aggrieved by a tort committed by any of the officers or members of the association is to sue the wrongdoers personally.⁶ This principle is unquestionable and is of general application but was departed from in the case of trade-unions by the decision of the House of Lords in the *Taff Vale* case⁷ where it was held that a registered trade-union though not incorporated could be sued in its registered name. This decision occasioned great controversy and agitation and was nullified by the Trade Disputes Act, 1906.⁸ The Trade Disputes and Trade Unions Act, 1927,⁹ has however declared that this immunity shall not apply to trade-unions who bring about a lock-out or strike which is illegal under that Act. In

1. Even when a statute requires 'personal negligence'; *Lochgelly Iron and Coal Co. v. M'ullan*, (1934) A.C. 1, 14.

2. Above, Chap. XVI, para. 14. As to liability for *ultra vires* acts, see *ibid.* A corporation can be even indicted for a crime; *R. v. Tyler*, (1891) 2 Q.B. 582, 593; *Triplex Glass Co. v. Lancagay Glass Co.*, (1939) 2 K.B. 395 C.A.; *Meadow Dairy Co. v. Cottle*, (1943) 1 K.B. 199.

3. Above, Chap. XVI, paras. 29 and 30. A department of Government is not liable merely by its incorporation for the acts of its subordinates; *Roper v. Commissioners of H. M.'s Works*, (1915) 1 K.B. 45; *Mackenzie-Kennedy v. Air Council*, (1927) 2 K.B. 51; cf. *Gillegham v. Minister of Health*, (1932) 1 Ch. 86.

4. *Raja Promuda Nath Roy v. Purna Chandra*, (1908) I.L.R. 35 Cal. 691.

5. *London Association for Protection of Trade v. Greenlands, Ltd.*, (1916) 2 A.C. 15, 21, 38. It may be otherwise by reason of statutory provisions; e.g., *Marshall Shipping Co. v. Board of Trade*, (1923) 2 K.B. 343; see also *A.G. v. G.S. & C. Ry. Co. of Ireland*, (1925) A.C. 754, 776, 779.

6. *Brown v. Lewis*, (1896) 12 T.L.R. 455. They cannot be sued through a few in a representative action under O. 16, r. 9, R.S.C., or O. 1, r. 8, C.P.C.; *Mercantile Marine Service Association v. Toms*, (1916) 2 K.B. 243; *Hardie & Lane, Ltd. v. Chiltern*, (1928) 1 K.B. 663. See *Bradey Egg Farm Ltd. v. Clifford*, (1943) 2 A.E.R. 378 C.A. (whole association not liable but only the executive council for negligent performance of contract).

7. (1901) A.C. 426; above, Chap. XI, para. 18.

8. 6 Ed. 7, c. 47, s. 4 (1). As to the effect of this section, see *Vacher & Sons, Ltd. v. London Society of Compositors*, (1913) A.C. 107; *Hardie & Lane, Ltd. v. Chiltern* above.

9. 17 & 18 Geo. 5, c. 22, s. 1; above, Chap. XI, para. 9.

India, the Trade Unions Act, 1926,¹ provides that a registered trade-union shall be a body corporate by the name under which it is registered and shall sue and be sued by that name; but as in England it cannot be sued or its funds proceeded against in respect of any act done by its officers in contemplation or furtherance of a trade-dispute.²

24. Joint right of action.—A joint right of action arises where, for instance, an injury has been caused to property owned or occupied by two or more persons. In such a case if one alone sues, the defendant can insist on others also joining. If he does not object, the suit can proceed and the plaintiff can recover damages to the extent of his interest. The other owners are not precluded thereby from suing subsequently for the damage to their interest.³ When there is no joint right, each person who sustains an injury has a separate cause of action and can sue alone though others were similarly injured,⁴ e.g., an assault or libel on several persons. These persons can however join in the same suit if the injury arose from the same act or transaction and if a common question of fact or law would arise in suits instituted by each of them.⁵

25. Joint wrongdoers.—Two or more persons may become joint wrongdoers (a) by committing a tort in concert, or in pursuance of an unlawful conspiracy,⁶ (b) by the principle of vicarious liability. Persons who act independently of one another are not joint wrongdoers merely because their acts cause the same damage, e.g., where two persons drive rashly and their collision causes injury to a third person.⁷ A person who negligently made excavations near the plaintiff's house and a water company who left a water-main insufficiently stopped at the spot were independent wrongdoers though the combined result of their negligence was the subsidence of the plaintiff's house.⁸ Similarly persons whose independent acts of obstruction of a public way cause a nuisance are not joint wrongdoers.⁹

1. XVI of 1926, S. 13.

2. Above, Chap. XI, paras. 9 and 16.

3. *Addison v. Overend*, (1796) 6 T.R. 766; *Sedgworth v. Overend*, (1797) 7 T.R. 279; *Broadbent v. Ledward*, (1839) 11 A. & E. 209.

4. *Roberts v. Holland*, (1893) 1 Q.B. 665. The rule is otherwise if the action is for breach of contract and not in tort; *Sobanadri v. Parthasarathy*, (1931) 62 M.L.J. 154; 1932 Mad. 583.

5. C. P. C., O 1, r. 1; R.S.C., O 10, r. 1.

6. *Petrie v. Lamont*, (1842) 11 L.J.C.P. 63, per Tindal, C.J., "All persons in trespass who, aid or counsel, direct or join, are joint trespassers"; cf. definition of abetment in I.P.C., s. 107. See *Weston v. Peary Mohun*, (1912) 23 I.C. 721 at pp. 774, 775 (as to distinction between joint tort and conspiracy); see also *Bahoram v. Chandardhar*, 1927 Nag. 133; *Pugh v. Ashutosh Sen*, (1928) I.L.R. 8 Pat. 516 (P.C.); 56 I.A. 93; *Ram Prakash v. Bankey Bihari*, 1934 Pat. 394; *Kishen Prasad v. Rajaram*, (1925) 27 Bom. L.R. 1159; 1926 Bom. 13 (division of proceeds of cheque wrongfully converted by a person between members of his family made them joint wrongdoers); *Basharat Beg v. Hira Lal*, 1932 All. 401 (injuries caused by members of a crowd throwing stones); *Kalidas v. Saraswati*, I.L.R. (1942) 2 Cal. 268; 1943 Cal. 1. Above, Chap. XI, para. 11.

7. *The Koursk*, (1924) P. 140.

8. *Thompson v. London County Council*, (1899) 1 Q. B. 840.

9. *Sadler v. G. W. Ry. Co.*, (1896) A.C. 450.

26. Liability of joint wrongdoers.—Joint wrongdoers are jointly and severally liable for the whole damage.¹ The malice of one joint wrongdoer does not aggravate the damages payable by the others.² They are together liable only for the actual damage caused. If the plaintiff desires to get exemplary damages, he must sue the malicious wrongdoer separately. The malice of one joint wrongdoer may, however, destroy the defence of another like the defence of privilege in an action for defamation.³ A decree for damages against joint wrongdoers may be realised from any one or more of them. The cause of action against them is single and indivisible. Therefore a release granted to one discharges the others. But where it amounts only to a covenant not to sue one, the cause of action against the others is not extinguished.⁴ Thus a compromise with one of the defendants in an action for assault was held to be only a covenant not to sue him and to be no bar to damages being recovered against the others.⁵ A judgment obtained against one joint wrongdoer puts an end to the liability of others.⁶ In the case of independent wrongdoers against whom there are separate causes of action, a release or judgment in respect of one does not have the same effect.⁷ The above rule as regards the effect of a judgment against a joint wrongdoer has been abrogated in England by the Law Reform (Married Women and Tortfeasors) Act, 1935.⁸ This Act declares that a judgment recovered against a joint tortfeasor shall not be a bar to an action against another. In order to avoid abuse of process by repeated actions, it is further enacted that if more than one action is brought, the damages recoverable in them shall not exceed those awarded in the first action and the plaintiff shall not be entitled to costs in the later actions unless he had reasonable ground for bringing them.

1. As to cases of mesne profits decreed against a trespasser and his tenant, see *Raja Bhupendra v. Rajeswar*, (1930) 35 C.W.N. 367; 1931 Cal. 802. See *Arnell v. Paterson*, (1931) A.C. 560 (liability under the Dogs Act, 1906, of the owner of a dog which with another person's dog injured a flock of sheep is for the whole damage). Cf. *Har Krishna v. Qurban Ali*, I.L.R. 17 Luck. 284; 1942 Oudh. 73. For other instances, see *Calico Printers Association v. M. S. Kaisha*, 1938 Bom. 413; *Krishnaswami v. Narayanan*, 1939 Mad. 261.

2. *Clark v. Newsum*, (1847) 1 Ex. 131; *Chapman v. Ellesmere*, (1932) 2 K. B. 431, 472; a master may be liable to pay larger damages on account of the malice of his servant; see Sedgwick, *Damages*, Vol. I, s. 83; Gatley, *Libel and Slander*, p. 686.

3. Above, Chap. VII, para. 66.

4. *Duck v. Mayra*, (1892) 2 Q. R. 511; *Pollucki Town Bank v. Subramania Iyer*, 1934 Mad. 180; as to cases of reservation of right to sue others, see *Bateson v. Gostling*, (1871) L.R. 7 C.P. 9. As to effect of not appealing against a judgment in favour of one of the wrongdoers, see *Hanson v. Wearmouth Coal Co.*, (1939) 3 A.E.R. 47 C.A.

5. *Ramkumar Singh v. Ali Husain*, (1903) I.L.R. 31 All. 173; 6 A.L.J. 135; *Basharat Beg v. Hira Lal*, 1932 All. 401. Cf. *Raghunath Singh v. Mukundi Lal*, 1936 All. 780.

6. *Brinsmead v. Harrison*, (1871) L. R. 7. C.P. 547; *Ash v. Hutchinson & Co.*, (1936) Ch. 489.

7. *King v. Hoare*, (1844) 13 M. & W. 494. See also *Bulmer Rayon & Co. v. Freshwater*, (1933) A.C. 661.

8. 25 & 26 Geo. 5, c. 30, s. 6 (1) (a) and (b).

27. **Rights of contribution and indemnity among joint wrongdoers.**—The following rules prevailed in England before the Law Reform Act, 1935. One of several joint wrongdoers who paid the whole damages had no right to claim contribution from the others. This was known as the rule in *Merryweather v. Nixan*.¹ In that case the plaintiff and the defendant had caused wilful injury to a third person's mill and machinery. It was held that the plaintiff could not, on payment of the damages awarded against both of them to that person, recover his share from the defendant. The reason of the rule is that a wrongdoer must himself bear the consequences of committing a tort and cannot enforce an agreement, express or implied, to share the profit or loss of an unlawful undertaking or to be indemnified against its consequences. Therefore there can be no claim also for indemnity among joint wrongdoers,² e.g., by a person employed by another for an assault or slander. These rules against contribution and indemnity were however limited to manifestly illegal acts or wilful wrongdoing³ and not to wrongful acts done by mistake and in ignorance of their real character⁴ or by negligence.⁵ Thus it was held that an auctioneer who *bona fide* sold at the instance of *A* the goods of *B* could claim from *A* reimbursement for the damages paid to *B* for conversion.⁶ A stevedore who was engaged in discharging pig-iron from the plaintiffs' ship caused the death of a workman by his negligence. It was found that the accident was due also to the negligence of the plaintiffs in not providing safe tackle. The representatives of the deceased workman got a decree for damages against both the stevedore and the plaintiffs. The stevedore was held liable to contribute a half of the damages to the plaintiffs who had paid the whole.⁷ An employer is also entitled to indemnity

1. (1799) 8 T. R. 186; Sm. L. C., Vol. I, p. 447.

2. *Leslie, Ltd. v. Reliable Advertising Agency*, (1915) 1 K. B. 652; see also *Smith & Son v. Clinton*, (1908) 99 L. T. 840; *Haseldine v. Hosken*, (1933) 1 K. B. 822; *Howard v. Odhams Press*, (1938) 1 K. B. 1.

3. *Burrows v. Rhodes*, (1899) 1 Q. B. 816, 828, *per* Kennedy, J. As to cases of libel, see *Shackell v. Rosier*, (1836) 2 Bing. N. C. 634; *Apthorp v. Neville*, (1907) 23 T. L. R. 375; *Smith & Son v. Clinton*, above. But a contract not to disclose a libel may be valid; *Weld-Blundell v. Stephens*, (1920) A. C. 956; *Bradstreets British, Ltd. v. Harold*, (1933) 1 Ch. 190. As to motor accident insurance, see *Tinline v. White Cross Insurance Co.*, (1926) 3 K. B. 327; *James v. Brit. Insurance Co.*, (1927) 2 K. B. 311; the Road Traffic Act, 1930, s. 36.

4. *Burrows v. Rhodes*, above; see also *Betts v. Gibbins*, (1834) 2 A. & E. 57; *Dugdale v. Lovering*, (1875) L. R. 10 C. P. 196.

5. *Newcombe v. Yewen, etc.*, R. D. C. (1913) 29 T. L. R. 299 (indemnity of employer by independent contractor for negligence of latter); see also *Hughes v. Percival*, (1883) 8 A. C. at p. 446, *per* Lord Blackburn, as to the need of taking an express indemnity from the contractor; *The Englishman and the Australia*, (1895) P. 212; for cases of indemnity of agent, see *Cory & Sons v. Lambton*, (1917) 86 L. J. K. B. 401; *Kirby v. Chessum*, (1914) 30 T. L. R. 660; *Cointat v. Myham*, (1913) 2 K. B. 220.

6. *Adamson v. Jarvis*, (1827) 4 Bing. 66.

7. *Fulmer v. Wick and Pulteneytown Steam Shipping Co.*, (1894) A. C. 318; see also *The Kate*, (1935) P. 100.

by his servant, when without any fault on his part he is held liable for the wrong of the servant.¹ An employer must indemnify his servant against loss or injury resulting from an act which the latter does in the course of employment and which is not manifestly tortious.² A right of contribution was also allowed by statute in two cases: (a) as between promoters and directors of companies who are liable for untrue statements in a prospectus;³ (b) between ships which are both at fault in causing loss of life or personal injury to a person on board one of them.⁴ The rule against indemnity of tortfeasors does not affect the validity of a contract of insurance by which the owner or driver of a motor car is indemnified by an insurance company against third-party risks.⁵

28. Rights of contribution and indemnity among joint wrongdoers in India.—In India, the above rules against contribution and indemnity subject to the above qualification have been applied.⁶ Thus the Madras High Court held that a person could not claim contribution for money paid by him for satisfying a decree for costs passed against him and the defendant in a litigation which arose from his wilfully procuring a breach of contract of sale entered into by the defendant with a third person.⁷ On the other hand contribution has been allowed for costs decreed in a litigation which did not arise out of any wilful wrong,⁸ for

1. *Green v. New River Co.*, (1792) 4 T. R. 589; see also *Smith & Son v. Clinton*, (1908) 99 L. T. 840. 2. *Sheffield Corporation v. Barclay*, (1905) A. C. 392; *Secretary of State for India v. Bank of India*, (1938) 2 A. E. R. 798 : 175 I. C. 327 (P.C.).

3. The Companies Consolidation Act, 1908 (8 Ed., 7, C. 69). See also The Indian Companies Act (VII of 1913), s. 100 (4).

4. Maritime Conventions Act, 1911 (1 & 2 Geo. 5, c. 57); *The Cairnbahn*, (1914) P. 25.

5. An insurance company cannot be made a party in the action against the owner or driver if tried by a jury in England; *Carpenter v. Ebbel-White*, (1939) 1 K. B. 347 C. A. See also *Murfin v. Ashbridge Martin*, (1941) 1 A. E. R. 231 C. A. This does not apply to a case tried by a judge; *Harman v. Crilly*, (1943) 1 K. B. 168 C. A. The insurer can apply to set aside judgment by default of insured; *Windsor v. Chalcraft*, (1939) 1 K. B. 279 C. A. For illustrations of construction of policy, see *Digby v. General Accident &c. Corporation*, (1942) 2 A. E. R. 319 (H. L.); *Richards v. Cox*, (1943) 1 K. B. 279 C. A. See also *Woolfall & Rimmer Ltd. v. Moyle*, (1942) 1 K. B. 66.

6. *Yegnanarayana v. Jagannadha*, (1931) 34 L. W. 618 : 1932 Mad. 1, where the authorities were reviewed by Madhavan Nair, J.; *Sheo Ratan v. Kuran*, (1924) I. L. R. 46 All. 860 : 22 A. L. J. 788; *Parbhoo v. Dwarka Prasad*, (1931) I. L. R. 54 All. 371 : 1932 A. L. J. 215; notwithstanding dicta in older cases suggesting the contrary; e.g., *Nihal Singh v. Collector of Bulandshahr*, (1916) I. L. R. 38 All. 237 : 14 A. L. J. 275; *Kamala Prasad v. Kishori Mohan*, (1927) I. L. R. 55 Cal. 666; *Mahabir Prasad v. Darbhanga*, (1919) 51 I. C. 697 (Pat); *Karya Singh v. Shiva Katan*, 1925 Oudh 408. See also *Busanta Kumar Basu v. Ramshankar*, (1931) I. L. R. 59 Cal. 859, 898.

7. *Yagnanarayana v. Jagannadha*, 34 L. W. 618, above.

8. *Lachmi*, (1922) I. L. R. 45 All. 99 : 20 A. L. J. 890; *Mahabir Prasad v. Dharbhanga*, (1919) 4 Pat. L. J. 486 : 51 I. C. 697; *Gurulingappa v. Somanna*, (1930) I. L. R. 55 Bom. 94 : 32 Bom. L. R. 1246. As to a possible distinction between co-plaintiffs and co-defendants, see *Muthuswami v. Subramania*, (1931) 34 L. W. 712 : 1932 Mad. 146; per Curgenven, J. There is no contribution if the defendants were independent trespassers, *Nand Lal Singh v. Beni Madho Singh*, (1918) I. L. R. 40 All. 672 : 16 A. L. J. 689.

mesne profits decreed against persons who set up a *bona fide* claim of title to immovable property,¹ and for damages awarded for injury done to crops by the cattle of several owners.² The more recent trend of opinion is in favour of holding on the analogy of the English statute mentioned below that contribution between joint tortfeasors might be allowed.³

29. Law Reform (Married Women and Tortfeasors) Act, 1935.⁴—This Act has made a drastic change in the law of England on this matter. It abrogates the above rules and introduces new ones similar to those that prevail under the Maritime Conventions Act, 1911, in the Admiralty Courts in cases of collisions of ships. It enacts that one tortfeasor may recover contribution from another who is also liable in respect of the same damage but not from a person who is entitled to be indemnified by him in respect of the liability. The amount of the contribution will depend on what the court considers just and equitable having regard to the plaintiff's responsibility for the damage.⁵ The court has power to refuse contribution altogether or to grant contribution amounting to a complete indemnity.⁶ This Act does not, however, render enforceable any agreement for indemnity which would not have been enforceable otherwise. But though a court may not enforce such an agreement, it may pass a decree for indemnity in a claim for contribution under the Act. The power conferred by the Act may be exercised by apportioning the damages among the defendants and not necessarily in a separate proceeding for the purpose.⁷ In India the law already settled by decisions would presumably be followed till there is similar legislation.⁸

30. Death of parties.—The general rule of the common law in regard to the death of parties to an action in tort is *actio personalis moritur cum persona*.⁹ The effect of this maxim is that the death of

1. *Ram Bilab v. Amir Singh*, (1921) 61 I.C. 425 (Pat.); *Jhibu v. Balaji*, 1923 Nag. 255; *Sheo Ratan v. Karan*, (1924) I.L.R. 46 All. 860; 22 A.L.J. 788; *Kamala Prosad v. Kishori Mohan*, (1927) I.L.R. 55 Cal. 666; *Darbani Lal v. Damodar Das*, 1929 All. 792; *Basanta Kumar Basu v. Ramshankar*, (1931) I.L.R. 59 Cal. 859, 898.

2. *Karya Singh v. Shiva Ratan*, (1925) 86 I.C. 913 (Oudh).

3. *Khushatrao v. Bapurao*, I.L.R. 1942 Nag. 1; 1942 Nag. 52; *Venkata Rao v. Venkayya*, (1942) 2 M.L.J. 427; 1943 Mad. 38.

4. See also Law Reform (Miscellaneous Provisions) (Scotland) Act, 1940, 3 and 4 Geo. 6, c. 42, S. 3.

5. *E.g.*, *Burnham v. Buyer*, (1936) 2 A.E.R. 1165; *Croston v. Vaughan*, (1938) 1 K.B. 540; *Daniel v. Rickett Cockerell & Co.*, (1938) 2 A.E.R. 631.

6. For such a case, see *Ryan v. Fildes*, (1938) 3 A.E.R. 517; above, Chap. XVI, para. 10.

7. *Croston v. Vaughan*, above; for illustrations, see *Rippon v. Port of London Authority*, (1940) 1 K.B. 858; *Miller v. Liverpool Co-operative Society*, (1940) 4 A.E.R. 367; *Wilkinson v. Rea, Ltd.*, (1941) 1 K.B. 688 C.A.; *Daniels v. Ricketts*, (1938) 2 K.B. 322.

8. As to the law in Continental Countries, see Dr. Ernest Cohn, 51 L.Q.R. 468.

9. Above, Chap. II, para. 32.

the party wronged or of the wrongdoer puts an end to the cause of action. Therefore a suit cannot be instituted by or against his representative. A suit or appeal¹ properly instituted will abate on the death of either party during its pendency. If, however, the suit had ended in a decree for damages in favour of the plaintiff, further proceedings by appeal or otherwise will not abate on the death of either party.² To the above maxim one qualification was recognised by the common law, *viz.*, that an action would lie against the representative of a wrongdoer whose estate had been added to or benefited by the appropriation of another's property. In *Phillips v. Homfray*³ the defendant had worked and taken the coal in the plaintiff's mine and it was held that on his death the action could be continued against his representative for the value of the coal wrongfully taken but not for the use of the underground passages in the plaintiff's mine or for injury to it. Other exceptions were made by statute⁴ in the case of claims to property. Subject to these exceptions, the maxim continued in force for several centuries in regard to actions for torts and was abrogated in England only in 1931. It was modified by legislation earlier in India. It has for long been held not to be applicable to an action for breach of contract.⁵

31. Law Reform (Miscellaneous Provisions) Act, 1934.—By this Act⁶ it is declared that on the death of any person all causes of action⁷ subsisting against or vested in him shall survive against or for the benefit of his estate, except causes of action for defamation, seduction, inducing

1. *Josiam Thiruvengadachari v. Sawmi*, (1910) I.L.R. 34 Mad. 76; 20 M.L.J. 760; *Marwadi Motkiram v. Sawmi*, (1916) 31 M.L.J. 772; 38 I.C. 823.

2. *Gopal v. Ramachandra*, (1902) I.L.R. 26 Bom. 597; 4 Bom. L.R. 325; *Paramen Chetty v. Sundararaja*, (1903) I.L.R. 26 Mad. 499; *Salig Ram v. Charan Dass*, 1939 Lah. 492; *Haridas Narayanadas v. Jagannath*, I.L.R. 1940 Nag. 63; 1939 Nag. 256. It is otherwise if a decree only declared a personal right or status; *Kalloo v. Ramsan*, 1943 Oudh. 14.

3. (1883) 24 Ch. D. 439; *Peck v. Gurney*, (1873) L.R. 6 H.L. 377; *Geipal v. Peach*, (1917) 2 Ch. 108; *Tirumala Nagubhushanam v. Sri Raja Venkataradi*, (1912) 23 M.L.J. 265; *Ghulam Rashid v. Muhammad*, 1941 All. 187.

4. (1925) 15 Geo. 5, c. 23, s. 26 (1) and (2) repealing the older statutes, *viz.*, (1330) 4 Ed. III, c. 7 and 25 Ed. III, c. 5, as regards goods and chattels, and (1833) 3 & 4 Will. 4, c. 42, s. 2, as regards real estate. An action lay for damage to personal estate due to deceit; *Twycross v. Grant*, (1878) 4 C.P.D. 40; or slander of title; *Oakey v. Dalton*, (1887) 35 Ch.D. 771; but not for loss due to physical injury or libel: *Pulling v. G.E. Ry. Co.*, (1882) 9 Q.B.D. 110; *Hutchard v. Mege*, (1887) 18 Q.B.D. 771 (action for disparagement of goods survives).

5. *Pinchon's case*, (1612) 9 Co. Rep. 86 (b); Holdsworth, Vol. III, p. 452. See *Bradshaw v. L. & Y. Ry. Co.*, (1875) L. R. 10 C. P. 189; see above, p. 66. As to an action for breach of promise, see *Chamberlain v. Williamson*, (1814) 2 M. & S. 408; *Findlay v. Chirney*, (1887) 20 Q. B. D. 494; *Quirke v. Thomas*, (1915) 1 K. B. 516.

6. 24 & 25 Geo. 5, c. 41, s. 1 (1)

7. A cause of action to recover a statutory penalty is also included; *A. G. v. Canter*, (1939) 1 K. B. 318 C. A.

one spouse to leave the other and claims for damages for adultery. Where a cause of action survives for the benefit of the estate of a deceased person, the damages that can be recovered shall not include any exemplary damages.¹ A suit by or against² a person in tort may therefore be continued by or against his representative. But a suit can be brought against the representative only if the cause of action arose not earlier than six months before the death of the wrongdoer and the suit is brought not later than six months after the personal representative took out representation.³

32. Indian Succession Act⁴.—It enacts that all causes of action in favour of or against a person survive, except those for defamation, assault as defined in the Indian Penal Code, and other personal injuries not causing the death of the party.⁵ The term 'personal injury' has been understood to mean not merely physical injury but also any injury other than one to the estate of the deceased person; for instance, an action for malicious prosecution would abate on the death of either party.⁶ Actions for recovery of money or property will therefore survive.⁷ There is also an Act, *viz.*, the Legal Representatives' Suits Act, 1855,⁸ which allows an action against the representatives of a person for any wrong committed by him in his lifetime and within one year before his death. This Act does not apply to a suit instituted against him in his lifetime⁹; such a suit would be governed by the narrower rule of the Succession Act.

32-A. Accord and satisfaction.—It is open to the parties, *i.e.*, the injured party and the tortfeasor to extinguish the liability of the latter by

1. S. 1 (2).

2. See *In the Goods of Knight*, (1939) 3 A. E. R. 928 (letters of administration granted to Official Solicitor for suing deceased's estate). 3. S. 1 (3).

4. Act 39 of 1925, s. 306.

5. The section speaks of survival to or against executors and administrators. A similar rule applies to heirs; *Marwadi Mothiram v. Samnaji*, (1916) 31 M. L. J. 772; *Krishna Behari v. Calcutta Corporation*, (1904) I. L. R. 31 Cal. 993; *People's Bank of N. India Ltd. v. Des Raj*, 1935 Lah. 705; *People's Bank of N. India Ltd. v. Hargopal*, I. L. R. 17 Lh. 262; 1936 Lah. 268, 271; *contra*, *Official Liquidators v. Jugal*, I. L. R. 1939 All. 6; 1939 All. 1. See above, Chap. II, para. 41.

6. *Rustomji v. Nurse*, (1920) I. L. R. 44 Mad. 357; 40 M. L. J. 173; *Murugappa Chettiar v. Ponnusami Pillay*, (1921) I. L. R. 44 Mad. 828; 41 M. L. J. 304; *Mahtab Singh v. Hub Lal*, (1926) I. L. R. 48 All. 630; 24 A. L. J. 796; *Motilal v. Harnarayan*, (1923) I. L. R. 47 Bom. 716; 25 Bom. L. R. 435; *Punjab Singh v. Ramantar*, (1919) 4 Pat. L. J. 676; 52 I. C. 348; but see *Bhupendra v. Chandramoni*, (1926) I. L. R. 53 Cal. 987; *People's Bank v. Des Raj*, 1935 Lah. 705.

7. *Court of Wards v. Ajodhia*, 1938 All. 305 (action against Court of Wards for conversion by ward). 8. Act XII of 1855.

9. *Haridas v. Ramadas*, (1889) I.L.R. 13 B. 677; *Ramchode v. Rukmany*, (1905) I.L.R. 28 Mad. 487; *Krishna Behary v. Corporation of Calcutta*, (1904) I.L.R. 31 Cal. 406; 8 C.W.N. 329; *Tummala Nagabhushanam v. Sri Rajah Venkatadri*, (1904) I.L.R. 31 Cal. 406; 8 C.W.N. 329.

accord and satisfaction *i.e.*, by an agreement for valuable consideration between them.¹ A release or abandonment of the right of action of the injured party has the same effect but it need not be for consideration.

33. Assignment of right of action.—The assignment of a right of action for damages for a tort is illegal and void.² This is part of a larger rule which prohibits an assignment of a mere right to sue³ including a right to sue for damages for breach of contract.⁴ The rule is based on grounds of public policy and intended to prevent trafficking in litigation. An assignment of a decree for damages before or after it has been passed is however not invalid.⁵ But an assignee of a mere right to sue for a tort committed against the assignor cannot sue.⁶ To this principle there are some exceptions :

(a) Where property is transferred, rights of action annexed thereto pass with it to the transferee,⁷ *e.g.*, injury to real property. A sale of a chattel is valid though it can be recovered only by litigation by the purchaser.⁸

(b) The right to receive compensation payable under the Lands Clauses Consolidation Act for an injury to land caused by works by railway authorities was held assignable.⁹

(c) An insurer can, by reason of payment made by him to satisfy a claim by the insured, get an assignment and sue as assignee of the right of action which the latter had against a third party who caused the loss.¹⁰

34. Place of suing.—An action for a tort committed in British India may be brought either in the place where it was committed or where the defendant resides or carries on business.¹¹ An action for a wrong to immovable property can be brought only in the court within whose jurisdiction the property is situate.¹²

1. It may be conditional; *e.g.*, *British Russian Gazette &c. Ltd. v. Associated Newspapers Ltd.*, (1933) 2 K.B. 616, 643, 650. Acceptance of apology in a criminal case, not a bar to a suit unless there was an agreement operative as accord and satisfaction; *Govinda-charyalu v. Seshagiri*, 1941 Mad. 860.

2. *Prosser v. Edmonds*, (1835) 1 Y. & C. 481; *Defries v. Milne*, (1913) 1 Ch. 98.

3. S. 6(e) of the T. P. Act. See also S. 60(e), C.P.C.

4. *Abu Mahomed v. Chunder*, (1909) I.L.R. 36 Cal. 345.

5. *Glegg v. Bromley*, (1912) 3 K.B. 474; *Gholam Mohomed v. Indrachund*, (1871) 7 B.L.R. 318.

6. *Pragi Lal v. Fateh Chand*, (1882) I.L.R. 5 All. 207 (wrongful attachment); *Sukhamaye v. Manoranjan*, 1926 Cal. 428 (mesne profits).

7. Cf. *Ellis v. Torrington*, (1920) 1 K.B. 399. This rule would apply to a transfer by operation of law as on a bankruptcy.

8. *Dawson v. G. N. & City Ry.*, (1905) 1 K.B. 260 at p. 271.

9. *Dawson v. G. N. & City Ry.*, above.

10. *King v. Victoria Insurance Co.*, (1906) A.C. 250.

11. C. P. C., ss. 19, 20.

12. C. P. C., s. 16.

35. Action for tort committed abroad.—An action for trespass or other injury to land outside England or India cannot be brought in these countries.¹ In the case of other torts committed abroad, an action will lie in England if the defendant resides in England,² and in India if he resides in India.³ There are however two conditions:

(a) The act must be unlawful where it was committed. In *Phillips v. Eyre*,⁴ an action for false imprisonment of the plaintiff alleged to have been committed by the Governor of Jamaica was held not maintainable in England because in respect of this and other acts done in the course of suppressing a rebellion, an Indemnity Act of the local legislature protected the defendant from action. The condition is satisfied if the act is not lawful or justifiable; it need not be actionable. In *Machado v. Fontes*,⁵ an action for a libel published in Brazil was allowed in England though a libel was not actionable but only a crime in the law of Brazil.

(b) The tort must be actionable according to the law of England or India.⁶

36. Limitation of actions.—Under the Indian Limitation Act,⁷ 1908, the periods of limitation vary in the case of different torts. A period of one year is prescribed for actions for personal injuries like assault, false imprisonment, actions under the Fatal Accidents Act, actions for malicious prosecution, libel and slander, seduction, procuring breach of contract,

1. *British South Africa Co. v. Companhia De Mocambique*, (1893) A. C. 602.

2. *Mostyn v. Fabrigas*, (1774) 1 Cowp. 161; as to claims under the Fatal Accidents Act for death of a foreigner on board a British ship, see *Davidson v. Hill*, (1901) 2 K.B. 606. The rule applies to wrongs committed on the high seas; *Submarine Telegraph Co. v. Dickson*, (1866) 33 L.J.C.P. 139 (injury to cables); or to wrongs committed in aircraft; *McNair*, Law of the Air, pp. 94-98.

3. *Govindan Nair v. Achyuta Menon*, (1915) L.L.R. 39 Mad. 433; 28 M. L. J. 310. For a case of libel in French and Belgian newspapers with a small circulation in England, see *Kroch v. Rossell*, (1937) 1 A.E.R. 725.

4. (1869) L. R. 4 Q. B. 225; 6 Q. B. 1; see also *Carr v. Francis Times & Co.*, (1902) A. C. 176; *Walpole v. Canadian Northern Ry. Co.*, (1923) A. C. 113; *McMillan v. Canadian Northern Ry. Co.*, (1923) A. C. 120; *Issacs v. Cook*, (1925) 2 K.B. 391, 400; *Govindan Nair v. Achyuta Menon*, (1915) L. L. R. 39 Mad. 433.

5. (1897) 2 Q. B. 231; see also *Scott v. Lord Seymour*, (1862) 1 H. & C. at p. 234, (assault at Naples, only a crime).

6. *The Halley*, (1868) L. R. 2 P. C. 193, where the defence of compulsory pilotage was allowed though not recognised by the law of Belgium in whose waters the collision occurred.

7. In England under the older Statutes of Limitation, *viz.*, 21 Jac. I, c. 16, s. 3, the general rule is six years; two years for action for slander actionable *per se*; four years for an action for assault or false imprisonment. Now by the Act of 1939 (2 & 3 Geo. 6, c. 21) a general period of six years is fixed for any action on tort. The Public Authorities Protection Act, 1893, prescribes a period of six months for actions against persons in respect of acts done while discharging public duties. It applies to infants as well; *Jacobs v. L. C. C.*, (1935) 1 K. B. 67. For other authorities under the Act, see *Bradford Corporation v. Myers*, (1916) 1 A. C. 242; *Betts v. Receiver for Metropolitan Police Dt.*, (1932) 2 K.B. 595; *Griffiths v. Smith*, (1941) A. C. 170.

illegal distress ; a period of two years, for actions under the Legal Representatives' Suits Act, 1855, against an executor, and for any malfeasance, misfeasance or non-feasance not specially provided for ; a period of three years for trespass to movable or immovable property, waste, obstruction of a water course, conversion, deceit, infringement of copyright, contribution for payment under a joint decree. A short period of ninety days is prescribed for misfeasance or non-feasance of statutory duties.¹ Besides, there are special² and local enactments like those relating to Municipalities and Local Boards which prescribe a special period of limitation for suits against public or local authorities and their officers.³

37. Notice of action.—A suit against the Crown, or against a public officer in respect of any act purporting to be done by him in his official capacity, may be instituted only after the expiry of two months next after notice in writing given to the defendant.⁴

37-A. Sanction of Government.—Under S. 270 of the Government of India Act, 1935, the sanction of the Governor of a Province or of the Governor-General is required before any proceeding, civil or criminal, can be instituted against a servant of the Crown in respect of any act done or purporting to be done by him in discharge of his duty.⁵

38. Successive actions for the same injury.—It is an elementary rule of the law of procedure that every suit must comprise the whole of the claim in respect of the cause of action and a second suit for a portion of the

1. Art. 2.

2. Police Act, 1861, S. 21, *Maharani of Nabha v. Madras*, (1942) 2 M. L. J. 14; (1944) 1 M. L. J. 399 (F. C.).

3. E.g., the Madras District Municipalities Act of 1920, s. 350 (six months). See *The Commissioners for the Port of Calcutta v. Calcutta Corporation*, (1937) 41 C. W. N. 1317 (P. C.); 1937 P. C. 306; cf. *Vincent v. Tauranga Electric Power Board*, (1937) A. C. 196.

4. C. P. C., s. 80; as to suits against municipal authorities and officers, see e.g., Madras Act V of 1920, s. 350 (a month's notice); Madras Local Boards Act (XIV of 1920), s. 225 (two months' notice). As to the scope of C. P. C., s. 80, see *Bhagchand v. Secretary of State for India*, (1927) I. L. R. 51 Bom. 725 (P. C.) (it applies to suits for injunctions), *Koti Reddi v. Subbiah*, (1918) I. L. R. 41 Mad. 792; 34 M. L. J. 494 (it applies to malicious and dishonest acts and not merely to acts done honestly in discharge of his duty as an officer); see also *Jogendranath v. Price*, (1897) I. L. R. 24 Cal. 584; cf. *Karuppanna Pillay v. Haughton*, (1936) I. L. R. 59 Mad 887. For a distinction in the statutory requirement as to notice between actions against a member of a municipal corporation and the corporation itself, see *Hall v. Kingston and St. Andrew Corporation*, (1941) A. C. 284. As to effect of extension of time by two months under s. 80 for suit against one of several tortfeasors on the suit against others, see *Udharam v. Grahams Trading Co.*, (1937) Sind. 281.

5. E.g. *Maharani of Nabha v. Madras*, (1944) 1 M. L. J. 399 F. C., in appeal from (1942) 2 M. L. J. 14; see also *Maratha v. Joshi*, I. L. R. 1938 Bom. 770; 1938 Bom. 419; *Sewalram v. Abdul Majid*, I. L. R. (1938) 1 Cal. 581; (1938) Cal. 177; *Hori Ram Singh v. R.*, I. L. R. 1940 Lah. 400 F. C.; 1939 F. C. 43.

claim is barred.¹ For instance, the plaintiff in an action for physical injury must ask for compensation for all the damage past as well as prospective. He cannot file a second suit for a fresh item of damage arising from the same injury. The same is the case with other injuries like libel or trespass. In cases like slander not actionable *per se* in England,² or an excavation of one's land causing the subsidence of the neighbour's,³ the cause of action arises only on damage and therefore the plaintiff need not, and in fact cannot include, prospective damage in a suit for past damage arising from the wrongful act. Similarly there is no bar to a second suit when there are two different causes of action arising on the same facts. For instance it was held that a person who received damages for injury to his cab in a collision due to the defendant's negligence could sue again for personal injury caused in the same accident.⁴ It is hardly necessary to say that if the same right is violated on two different occasions, *e.g.*, repeated acts of trespass, there are distinct wrongs for which separate actions would lie. Similarly a continuing injury gives rise to a new cause of action from time to time and can be the subject of successive suits, *e.g.*, a continuing nuisance. In such a case damages can be recovered only for the past and not for prospective injury.⁵ The proper course is to ask for an injunction to prevent future damage.

39. **Waiver of tort.**—Under the old procedure parties were allowed to waive the tort and sue in an action of assumpsit even in cases where there was no contract at all. This was done by means of the fiction of quasi-contract already considered.⁶ The principal instances were those where the defendant was in possession of money or chattels belonging to the plaintiff and was bound to restore them to him. For instance a person whose goods were wrongfully converted by another could waive the tort and sue in an action for money had and received to the plaintiff's use.⁷ The limit to which this fiction could be carried was not settled,⁸ but the question is hardly of any importance in the reformed procedure of the present day. There is no room now for fictions which were formerly useful for mitigating the rigours and anomalies of the old common law procedure. For instance an action of trespass or trover did not lie against the executor of a deceased wrongdoer and therefore the aggrieved waived the tort and

1. C. P. C., O. 2, r. 2.

2. Above, Chap. VII, para. 86.

3. Above, Chap. VI, paras. 28 and 91.

4. *Brunsdon v. Humphrey*, (1884) 14 Q. B. D. 141.

5. Above, Chap. VI, para. 91.

6. Above, Chap. I, para. 17.

7. Above, Chap. V, para. 71.

8. See *Lightly v. Clouston*, (1808) 1 Taunt. 112 (where the plaintiff whose apprentice was wrongfully taken by the defendant into his service was allowed to sue him for a reasonable remuneration for the apprentice's services as on a contract of hire).

sued the executor in an action of assumpsit¹ to which the doctrine of *actio personalis moritur cum persona* did not apply.² At a later time an action in tort was allowed by statute in such a case.³ A person cannot now adopt the device of disguising a cause of action in tort as one in contract or *vice versa*, for obtaining an advantage to which he is really not entitled. For instance, a person from whom the Shipping Controller, purporting to act under the Defence of the Realm Regulations passed during the last war, exacted an illegal payment sued the Crown by a petition of right as on an implied contract for money had and received. The Indemnity Act, 1920, took away the right to sue the Crown for compensation for the *bona fide* acts of its officers in discharge of their duties, but saved "proceedings in respect of rights under contract." It was held that the plaintiff could not waive the tort and sue on an implied contract for bringing his case within the saving clause.⁴ Conversely a person cannot convert an action in contract into one in tort for avoiding the rule against enforcing the contract of an infant.⁵ In *United Australia Ltd. v. Barclays Bank*⁶ already discussed, the House of Lords held that a person who adopts one of the alternative remedies in tort and contract is not thereby deprived of the other remedy unless he had obtained satisfaction of the judgment obtained in the first proceeding.

40. **Alternative causes of action in tort and contract.**—The concurrence of causes of action in tort and contract formerly gave rise to problems which have ceased to vex lawyers and litigants after the abolition of forms of action and the introduction of a reformed civil procedure by legislation culminating in the Judicature Act, 1875.⁷ At the present day a plaintiff need not adopt any set words or formula in his pleading. He is required only to state concisely the material facts constituting the cause of action.⁸ He need not designate his cause of action as one in tort or breach of contract. Even if he did so wrongly, he will not for that reason alone lose the reliefs which on a proper view of his case he is in justice entitled to. But even at the present day it may become necessary to ascertain to which of these two categories his cause of action really belongs. This happens in two types of cases; first, cases of real concurrence of the two causes of action; second, cases where there is no such concurrence. In the first, the distinction becomes material because the law makes a difference between an action for tort and an action for a breach of contract

1. Holdsworth, Vol. III, pp. 579-582; Vol. VIII, pp. 94, 95; *Phillips v. Homfray*, (1883) 24 Ch. D. at p. 457.

2. Above, para. 30.

3. Above, para. 30, note 4.

4. *Brocklebank v. The King*, (1925) 1 K.B. 52. See also *Hardie v. Chiltern*, (1928) 1 K.B. 663. 5. Above, para. 19. 6. (1941) A.C. 1; above, Chap. V, para. 71.

7. For a history of pleading and procedure, see Stone & Ramaswami Iyer, *Pleadings*, Chap. I. 8. R.S.C., O. 19, r. 4; C.P.C., O. 6, r. 2.

in certain matters, *e.g.*, (a) measure of damages, (b) death of parties, (c) statutes of limitation, (d) in England the provisions of the County Courts Acts prescribing different scales of costs. In the second type of cases the problem arises if at all only because a party seeks to make the one cause of action look like the other for obtaining the benefit of the distinction on the above matters; it then becomes necessary to ascertain to what category it belongs. The rules emerging from the cases may be stated thus:

(i) **Concurrence of both causes of action.**—(a) **Measure of damages.** The points of distinction on this head may make it worthwhile for a plaintiff sometimes to choose the one and sometimes the other. Damages for a tort may be exemplary and may be awarded for injury to feelings and on account of other aggravating circumstances but damages for a breach of contract are as a rule, subject only to two exceptions, awarded only by way of compensation for actual or material loss. The two exceptions are first, an action for breach of promise of marriage and second, a trader's action against his banker for dishonouring his cheque.¹ On the other hand damages for certain torts cannot be obtained unless a cause of action is made out by proof of special damage. But for a breach of contract there must be an award of at least nominal damages though no loss is proved.² Again on the question of causation or responsibility for consequences which may determine the amount of damages or even the liability itself the rules are not always identical. Liability in tort will be for all natural or direct consequences³ but in contract, will, under the second branch of the rule propounded in *Hadley v. Baxendale*, be only for the damage arising from special circumstances of which the defendant had notice.⁴ On particular facts the two rules may diverge and produce different results. In view of these points of distinction the course open to the plaintiff may be of importance. When he complains of breach of a duty at once contractual and tortious, *e.g.*, negligent operation by a surgeon, misdelivery or some other misfeasance by a bailee, he is entitled to the rule which is more favourable to him and ask the court to treat his cause of action as the one or the other for that purpose. In the older procedure he could sue in one form of action or the other, the action of *assumpsit* or a delictual action like trespass, case, trover or deceit and obtain the benefits incident to the particular action chosen.⁵ The position in substance has not changed merely by reason of the change in the law of procedure. Otherwise the result

1. Above, Chap. I, para. 15.

2. *Marsetti v. Williams*, (1830) 1 B. & Ad. 415.

3. Above, Chap. XIV, para. 66.

4. Above, Chap. XIV, para. 93.

5. *Brown v. Boorman*, (1844) 11 Cl. & F. 1; *Austin v. G. W. Ry. Co.*, (1867) 8 B. & S. 327; *France v. Gaudet*, (1871) L.R. 6 Q.B. 199; see also the reference made by Lord James of Hereford to his experience in the Bar in *Addis v. Gramophone Co. Ltd.*, (1909) A.C. 488, 492.

would be that where a surgeon has injured a patient by gross negligence and callous indifference, the latter if he was admitted free of charge in a hospital will be able to get a higher scale of damages than if he engaged and paid the surgeon.

(b) **Death of parties.**—The same principles would apparently apply here also. If an action can be saved from abatement resulting from death of either party, it may be deemed to be in contract for that purpose. The occasions for such a problem arising are now rare,¹ because instead of the old common law rule of abatement for tort and survival for contract there is in England now a statutory rule under the Law Reform (Miscellaneous Provisions) Act, 1934, which provides for survival of all causes of action except in specified cases, and also enacts that exemplary damages cannot be claimed for the estate of a deceased person. In India the position is somewhat similar by reason of the Indian Succession Act.

(c) **Statutes of Limitation.**—Both in England and in India the period of limitation for a particular action depends on the terms of the statute. For instance, under the Indian Limitation Act, 1908, article 115 of the Second Schedule prescribes a period of three years for a suit for breach of contract, express or implied; and several articles prescribe periods of limitation varying from one to three years for certain specified torts.² If in any case art. 115 and one of these latter articles both apply, the article prescribing the longer period of time and keeping alive the plaintiff's claim can be availed of by him.³

(d) **County Courts Acts.**⁴—These Acts provide different scales of costs in the two kinds of actions.⁵ For the purpose of these provisions, actions against a bailee of a horse for injury to it,⁶ a dentist for injury to his patient by want of care and skill,⁷ a railway company for injury to a passenger,⁸ were held to be in tort, while an action against a broker for breach of instructions for purchase of certain shares was held to be one in contract.⁹

1. An occasion may arise by reason of S. 1 (3) of the Act mentioned in the text; *In the Goods of Knight*, (1939) 3 A. E. R. 928; *A. G. v. Canter*, (1938) 2 K. B. 826; affirmed by C. A. on another point, (1939) 1 K. B. 318; above, para. 31.

2. Above, para. 36.

3. *Tofa Lal Das v. Syed*, (1925) I. L. R. 4 Pat. 448; *Kasturchand v. Hari Govind*, 1934. Bom. 491. Cf. *Court of Wards v. Afodhia*, I. L. R. 1938 All. 454; 1938 All. 305.

4. 9 & 10 Vict., c. 95, s. 129; (1934) 24 & 25, Geo. 5, c. 53, s. 47.

5. By the later Act a plaintiff who instead of going to a C. C. goes to the High Court and recovers less than a minimum fixed by the Act is penalised in the matter of costs. The minimum is £. 50 for tort and £. 100 for contract. By the older Act a plaintiff who got less than £. 10 in tort or £. 40 in contract got no costs at all.

6. *Turner v. Stallibrass*, (1898) 1 Q. B. 56.

7. *Edwards v. Mallan*, (1908) 1. Q. B. 1002.

8. *Taylor v. M. S. & L. Ry. Co.*, (1895) 1 Q. B. 134; *Kelly v. Metropolitan Ry. Co.*, (1895) 1 Q. B. 944.

9. *Jarvis v. Mey*, (1936) 1. K. B. 399.

(ii) **Cases where there is no real concurrence.**—It is not always easy to say whether the cause of action is substantially the one rather than the other. The test suggested is to see whether there would be an actionable injury even if there were no contract.¹ If there is, it is a case of tort; otherwise it is contract. A good practical test is said to be whether if the claim on the contract were struck out of the pleading, any ground of action would remain.² If it would, it is not a case of contract; else it is. In *Groom v. Crocker*³, the plaintiff sued his solicitors for breach of duty in delivering, in a previous action against him for damages for negligent driving of a motor car, a defence admitting negligence without his consent and on the instructions of the insurance company with whom he had insured his car against third-party risks. It was held that the defendants were liable for breach of a contractual duty alone and therefore could not be mulcted in damages for injury to reputation or feelings. A verdict for £ 1,000 damages was reduced by the Court of Appeal to nominal damages of 40 s. as no special damage was proved. As the statement of the solicitors admitting negligence of the client amounted to a libel on him he got also damages for that tort. A plaintiff cannot adopt the device of disguising a cause of action in tort as one in contract or *vice versa* for obtaining an advantage to which he is not really entitled. For instance an action which is really in contract cannot be turned into one in tort for the purpose of suing an infant.⁴ Besides, in cases where the terms of a contract impose a limitation on the liability of a party to it the other party cannot evade those terms by alleging a wider liability in tort.⁵

41. Tort amounting to felony.—It is a settled rule in England that a person injured by a felony should before suing the offender for damages take steps to prosecute him and bring him to justice.⁶ If he brings an action, he must show that the felon had been convicted or that a prosecution was impossible or failed without any fault of his. This rule is based on a principle of public policy, *viz.*, that the claims of public justice must

1. Pollock, *Torts* (14th Ed.), p. 431; *Jarvis v. Moy*, (1936) 1 K. B. 399, 405 per Greer, L. J.

2. Winfield, *Law of Tort*, p. 702.

3. (1939) 1 K. B. 194 C. A. See also *Gibbons v. Westminster Bank Ltd.*, (1939) 2 K. B. 882 (plaintiff non-trader in action against banker dishonouring cheque can get only nominal damages in absence of special damage); *Steeles v. Ingram*, (1903) 19 T. L. R. 534 (breach of duty by architect—contract).

4. Above, para. 19. See also *Brocklebank v. The King*, (1925) 1 K. B. 52, which arose from the similar distinction in the case of a petition of right against the Crown. See also *Hardie v. Chiltern*, (1928) 1 K. B. 663.

5. *Elder Dempster v. Puterson*, (1924) A. C. 522; *Hall v. Brooklands Auto-Racing Club*, (1933) 1 K. B. p. 213, per Scrutton, L. J. The same rule may apply to cases where the alleged tort is connected with the performance of a contract with a third party; (1924) A. C. at p. 548, per Lord Finlay; *The Kite*, (1933) P. 154.

6. *Smith v. Selwyn*, (1914) 3 K. B. 98; see also *Wells v. Abrahams*, (1872) L. R. 7 Q. B. 554; *Ex parte Ball*, (1879) 10 Ch. D. 667 at p. 673. Above, Chap. II, para. 26.

take precedence over those of private reparation. The rule does not, however, bar an action but would be a ground for staying it till steps are taken to prosecute the offender. The rule applies only to a felony and not to a misdemeanour or an offence punishable only on summary conviction.¹ It does not apply again if the person suing is not the person injured by the felony; for instance, if he becomes a bankrupt it does not apply to an action by the trustee.² It does not apply also if the person sued were not the felon. An action will lie against an employer for injury due to a felony committed by his servant though the servant has not been prosecuted,³ or in trover against an innocent receiver of stolen goods, though the thief has not been prosecuted.⁴ The rule has been abrogated in cases of homicide by the Fatal Accidents Acts in England and India.⁵ Formerly the doctrine known as 'merger of trespass in felony' had a different meaning, viz., that an action of trespass did not lie in cases of felony. This doctrine which had its origin in the scope of the early writ of trespass⁶ survived for a long time even after its origin had been forgotten. This was because in practice the civil remedy of trespass was ineffective as the felon's goods were on his conviction forfeited to the Crown. After forfeiture was abolished in 1870, the rule had no meaning but was sought to be maintained on the ground of policy above referred to. It was ultimately understood to be not an absolute bar but only a rule of suspension of the remedy, because the principle of policy was sufficiently vindicated by the latter course. We have here another instance of the interesting phenomenon alluded to by Holmes⁷ with regard to the career of many an ancient rule in law: "The old form receives a new content, and in time even the form modifies itself to fit the meaning which it has received."

1. *Smith v. Selwyn*, above.

2. *Ex parte Ball*, above.

3. *Osborn v. Gillett*, (1873) L.R. 8 Ex. 88; above, Chap. II, para. 33.

4. *White v. Spettigue*, (1845) 13 M. & W. 603; *Marsh v. Keating*, (1833) 2 Cl. & F. 250.

5. Above, Chap. II, paras. 34 and 35.

6. Above, Chap. I, para. 11; Chap. II, para. 33.

7. Common Law, p. 5. For other instances, see the rule of trespass *ab initio*, above, Chap. IV, para. 40; of immunity of the common carrier for act of God, above, Chap. XV, para. 7.

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